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John F. BANZHAF, III, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

United States of America, Respondents,

WTRF-TV, Inc. and National Association of Broadcasters, American Broadcasting Companies, Inc., the Tobacco Institute, Inc., the American Tobacco Company, Brown & Williamson Tobacco Corp., Larus & Brother Co., Inc., Liggett & Myers Tobacco Co., Philip Morris, Inc., R. J. Reynolds Tobacco Co., United States Tobacco Co., P. Lorillard Co., Intervenors.

WTRF-TV, INC. and National Association of Broadcasters, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

United States of America, Respondents,

Heart Disease Research Foundation et al., Intervenors.

The TOBACCO INSTITUTE, INCORPORATED, et al., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

United States of America, Respondents.

Nos. 21285, 21525, 21526, 21577.

United States Court of Appeals District of Columbia Circuit.

Argued June 25, 1968.

Decided Nov. 21, 1968.

Petitions for review of orders of the Federal Communications Commission. The Court of Appeals, Bazelon, Chief Judge, held, inter alia, that Cigarette Labeling Act of 1965 does not constitute congressional preemption of field of regulation addressed to health problem posed by cigarette smoking and does not deny FCC authority to require radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking. The Court also held that the cigarette ruling did not violate the First Amendment.

Affirmed.

Wilbur K. Miller, Senior Circuit Judge, dissented in part.

1. Telecommunications ⇐435

FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking, which does not require inclusion of any statement in advertising of cigarettes, does not violate letter of Cigarette Labeling Act of 1965. Federal Cigarette Labeling and Advertising Act, §§ 5, 5(b, c), 10, 15 U.S.C.A. §§ 1334, 1334(b, c), 1339.

2. Telecommunications ⇐435

Cigarette Labeling Act of 1965 does not constitute congressional preemption of field of regulation addressed to health problem posed by cigarette smoking and does not deny FCC authority to require radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking. Federal Cigarette Labeling and Advertising Act, §§ 2–10, 5(b, c), 15 U.S.C.A. §§ 1331–1339, 1334(b, c).

3. Health ⇐20

Fact that Congress considered and declined to adopt broader legislation at hearings from which Cigarette Labeling Act of 1965 emerged did not establish that it intended to bar otherwise authorized agency action under established powers and duties by preempting field of regulation addressed to health problem posed by cigarette smoking. Federal Cigarette Labeling and Advertising Act, §§ 2–10, 5(b, c), 15 U.S.C.A. §§ 1331–1339, 1334(b, c).

4. Statutes ⇐181(1)

Court must decide questions of legislative intent by the lights they have, not by those they might have had.

5. Telecommunications ⇐435

FCC's 1964 disclaimer of intent to deal with cigarette problem did not deprive it of authority, subsequent to enactment of Cigarette Labeling Act of 1965, to require radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking. Federal Cigarette Labeling and Advertising Act, §§ 2–10, 5(b, c), 15 U.S.C.A. §§ 1331–1339, 1334 (b, c).

6. Telecommunications ⇐429

Power of FCC to designate programming not in the public interest authorizes FCC to regulate broadcast content. Communications Act of 1934, §§ 315, 315(a), 326, 47 U.S.C.A. §§ 315, 315(a), 326.

7. Telecommunications ⇐435

Broadcast licensee has broad discretion in giving specific content to duties to strike balance between various interests of the community or to provide reasonable amount of time for presentation of programs devoted to discussion of public issues, and on application for renewal of license FCC will focus on licensee's overall performance and good faith rather than on specific errors it may find him to have made. Communications Act of 1934, §§ 315, 315(a), 326, 47 U.S.C.A. §§ 315, 315(a), 326.

8. Telecommunications ⇐432

Public interest rulings of FCC relating to specific program content do not invariably amount to "censorship" within meaning of Communications Act. Communications Act, §§ 315, 315(a), 326, 47 U.S.C.A. §§ 315, 315(a), 326.

See publication Words and Phrases for other judicial constructions and definitions.

9. Telecommunications ⇐432

In view of settled practice of FCC of issuing rulings as to licensee's program content, doubtful issue whether Congress originally considered such rulings to constitute "censorship" would be resolved in the negative. Communications Act of 1934, §§ 315, 315(a), 326, 47 U.S.C.A. §§ 315, 315(a), 326.

10. Constitutional Law ⇐62

The "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards, especially when First Amendment issues are involved. U.S.C.A.Const. Amend. 1.

11. Telecommunications ⇐435

Ruling of FCC requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking could not be upheld merely on the grounds that it might reasonably be thought to serve the public interest, but as public health measure addressed to unique danger authenticated by official and congressional action, ruling was not invalid on account of its unusual particularity. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

12. Statutes ⇐219

In absence of evidence to the contrary, Congress would be deemed to have acquiesced in determinations of Radio Commission and the FCC that authority to license in the public interest includes authority to consider the public health. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

13. Telecommunications ⇐435

Authority of FCC to require radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking does not license the commission to scan the airways for offensive material with no more discriminating a lens than the "public interest" or even the "public health". Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

14. Constitutional Law ⇐90

First Amendment does not forbid FCC regulation of content of radio and

television programs. Communications Act of 1934, § 307, 47 U.S.C.A. § 307; U.S.C.A.Const. Amend. 1.

15. Constitutional Law ⇐90

FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking, supported by public health power of the Communications Act, does not abridge First Amendment freedoms of speech or press. Communications Act of 1934, § 307, 47 U.S.C.A. § 307; U.S.C.A.Const. Amend. 1.

16. Telecommunications ⇐435

Requiring radio and television stations which carry cigarette advertising to grant antismokers equal time could reasonably be found to be unnecessary intrusion upon licensees' discretion. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

17. Telecommunications ⇐435

Public health rationale supporting FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking would not justify compelling broadcasters to inform public that smoking might not be dangerous, and FCC did not abuse its discretion in refusing to require rebuttal time for cigarette manufacturers. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

18. Telecommunications ⇐437

Remedy of cigarette manufacturers raising issue of "fairness" with respect to FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking, because of FTC warning deterring manufacturer from making health claims in their advertisements, did not lie in particularization of FCC's fairness doctrine. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

19. Telecommunications ⇐437

Where FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking was made without providing interested parties either notice or opportunity to be heard, but numerous petitions for review were subsequently entertained and ruling was made prospective from date of affirming order, there was no prejudice to substantial rights. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

20. Telecommunications ⇐435

Premises of FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking, that cigarette advertising promotes smoking as desirable habit, that substantial authority regards habit as dangerous to health and that existing sources were inadequate to inform public of danger, were supported by record. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

Mr. John F. Banzhaf, III, petitioner pro se, and Mr. Earle K. Moore, New York City, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, for petitioner in No. 21,285 and intervenor in Nos. 21525–6.

Mr. Howard C. Westwood, Washington, D. C., with whom Messrs. Ernest W. Jennes, Herbert Dym, Jonathan D. Blake and Richard S. Morey, Washington, D. C., were on the brief for petitioners in Nos. 21525–6. Mr. Jerome Ackerman, Washington, D. C., also entered an appearance for petitioners in Nos. 21525–6.

Mr. Abe Krash, Washington, D. C., with whom Messrs. Paul A. Porter, Daniel A. Rezneck and Jerome I. Chapman, Washington, D. C., were on the brief for The Tobacco Institute, Inc. and Philip Morris, Inc., argued for all petitioners in No. 21,577. Mr. Porter R. Chandler, New York City, was on the brief for R. J. Reynolds Tobacco Co., petitioner in No. 21,577.

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Mr. Eugene R. Anderson, New York City, was on the brief for The American Tobacco Company, petitioner in No. 21,577.

Mr. Carleton A. Harkrader, Washington, D. C., was on the brief for P. Lorillard Co., petitioner in No. 21,577.

Mr. John H. Conlin, Associate General Counsel, Federal Communications Commission, with whom Asst. Atty. Gen. Donald F. Turner, Messrs. Henry Geller, General Counsel, Stuart F. Feldstein, William L. Fishman and Mrs. Lenore G. Ehrig, Counsel, Federal Communications Commission, were on the brief for respondents. Messrs. Robert D. Hadl, Attorney, Federal Communications Commission, and Howard E. Shapiro, Attorney, Department of Justice, also entered appearances for respondents.

Messrs. Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk, Daniel Marcus and Robert A. Warden, Washington, D. C., were on the brief for Columbia Broadcasting System, Inc., intervenor in Nos. 21,525 and 21,526.

Messrs. Donald J. Mulvihill and Howard Monderer, Washington, D. C., were on the brief for National Broadcasting Company, Inc., intervenor in Nos. 21,525 and 21,526.

Mr. Lloyd Symington, Washington, D. C., filed a brief on behalf of The National Tuberculosis Association as amicus curiae urging affirmance.

Messrs. Abe Krash, Paul A. Porter, Daniel A. Rezneck and Jerome I. Chapman, Washington, D. C., also entered appearances for The Tobacco Institute, Inc., American Tobacco Co., Brown & Williamson Tobacco Corp., Larus & Brother Co., Inc., Liggett & Myers Tobacco Co., Philip Morris, Inc., R. J. Reynolds Tobacco Co., United States Tobacco Co. and P. Lorillard Co., intervenors in Nos. 21,285, 21,525 and 21,526.

Messrs. James A. McKenna, Jr. and Vernon L. Wilkinson, Washington, D. C., entered appearances for American Broadcasting Companies, Inc., intervenor in Nos. 21,525 and 21,526.

Mr. Edgar F. Czarra, Jr., Washington, D. C., entered an appearance for WTRF-TV, Inc. and National Association of Broadcasters, intervenors in No. 21,285, and Spartan Radiocasting, Palmetto Radio, W. A. V. E., Inc., WFIE, Inc. and WFRV, Inc. and Indiana Broadcasting, Gulf Television Corporation, Corinthian Television Corporation and Great Western Broadcasting Corp., intervenors in Nos. 21,525 and 21,526.

Messrs. Vincent A. Pepper and Arthur V. Weinberg, Washington, D. C., entered appearances for WLLE, Inc., intervenor in Nos. 21,525 and 21,526.

Before BAZELON, Chief Judge, WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT, Circuit Judge.

BAZELON, Chief Judge:

In these appeals we affirm a ruling of the Federal Communications Commission requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking. This holding rests on negative answers to the following principal questions:

(I) whether in the Cigarette Labeling Act of 1965 Congress preempted the field of regulation addressed to the health problem posed by cigarette smoking so as to deny the FCC any authority it otherwise had to issue its cigarette ruling (infra, pp. 1087–1091);

(II) if not so forbidden, whether the ruling is nonetheless unauthorized (infra, pp. 1091–1099), either

(A) because the Commission has no authority to regulate broadcast content (infra, pp. 1093–1096), or

(B) because any authority over program content which the Commission may have cannot support a ruling of this kind (infra, pp. 1096–1099); and

(III) if neither forbidden nor unauthorized, whether the ruling is unconstitutional (infra, pp. 1099–1103), either

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(A) because the First Amendment permits no regulation of program content (infra, pp. 1099–1101), or

(B) because the cigarette ruling in particular violates the First Amendment (infra, pp. 1101–1103).

The history of the cigarette ruling dates to December 1966, when citizen John F. Banzhaf, III asked WCBS–TV to provide free time in which anti-smokers might respond to the pro-smoking views he said were implicit in the cigarette commercials it broadcast.[1] Although he cited several specific commercial messages, Banzhaf's target included

> all cigarette advertisements which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life.

He said this point of view raised one side of a "controversial issue of public importance" and concluded that under the FCC's fairness doctrine, WCBS was under obligation to "affirmatively endeavor to make [its] * * * facilities available for the expression of contrasting viewpoints held by responsible elements. * * *"

WCBS replied that it had broadcast several news and information programs presenting the facts about the smoking-health controversy, as well as five public service announcements of the American Cancer Society aired free of charge during recent months.[2] On the basis of these broadcasts it was confident that "its coverage of the health ramifications of smoking has been fully consistent with the fairness doctrine." But it doubted in any event that "the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services. * *"

Thereupon, Banzhaf forwarded the correspondence to the Federal Communications Commission under cover of a complaint that the station was violating the fairness doctrine.[3] And thereby hangs the following legal tale.

The Commission sustained the Banzhaf complaint. In a letter dated June 2, 1967,[4] it agreed that the cited cigarette commercials "present the point of view that smoking is 'socially acceptable and desirable, manly, and a necessary part of a rich full life,'"[5] and, as such, invoke the fairness doctrine. It said in part:

> We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e. g., the 1964 Report of the Surgeon General's Committee) and congressional action (e. g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health.[6]

The Commission refused, however, to require "equal time" for the anti-smoking position and emphasized that "the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable

1. Letter from John F. Banzhaf, III to Television Station WCBS-TV, December 1, 1966.

2. Letter from Clark S. George, Vice-President and General Manager, WCBS TV to John F. Banzhaf, III, December 30, 1966.

3. Letter from John F. Banzhaf, III, to Federal Communications Commission, January 5, 1967.

4. Television Station WCBS-TV, 8 F.C.C. 2d 381 (1967).

5. *Id.*

6. *Id.* at 381–382.

judgment of the licensee. * * *" But it directed stations which carry cigarette commercials to provide "a significant amount of time for the other viewpoint. * * *" And by way of illustration it suggested they might discharge their responsibilities by presenting "each week * * * a number of the public-service announcements of the American Cancer Society or HEW in this field." [7]

In response to numerous petitions and requests for reconsideration, the Commission affirmed its ruling in a lengthy Memorandum Opinion.[8] It rejected contentions that the fairness doctrine is unconstitutional and that the cigarette ruling is precluded by the Cigarette Labeling and Advertising Act of 1965. The opinion did make clear that cigarette advertising *in general*, not any particular commercials, necessarily conveys the controversial view that smoking is a good thing.[9] But the Commission stressed again that its ruling was "limited to this product—cigarettes" and disclaimed any intention "to imply that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance." [10]

While defending its failure to provide interested persons an opportunity to be heard before issuing its ruling, the Commission emphasized that any procedural lapse was cured by its exhaustive consideration of the many petitions for review. Finally, it concluded that, "the specifics of the Fairness Doctrine" aside, its ruling was required by the public interest.[11]

Subsequently, in response to a request for clarification, the Commission ruled that stations which carry cigarette advertising are under no obligation to provide the cigarette companies free time in which to respond to broadcast claims that smoking endangers health.[12]

In this review proceeding, the Commission is challenged at virtually every point. Mr. Banzhaf complains that the anti-smoking forces should have been granted equal time. Petitioners Station WTRF–TV, the National Association of Broadcasters, The Tobacco Institute, and eight cigarette manufacturers (hereinafter "petitioners"), all of whose appeals have been consolidated, complain of almost everything else. They are supported by Intervenors CBS and NLC–ABC–WLLE Inc. The Commission is supported by the interventions of the American Tuberculosis Association and the ubiquitous Mr. Banzhaf.

We turn now to the issues these legal armies present for our consideration.

I. The Cigarette Labeling Act

[1] We are confronted at the outset by the contention that the Commission's action is precluded by the Federal Cigarette Labeling and Advertising Act of 1965.[13] That Act requires cigarette manufacturers and importers to print on

7. *Id.* at 382. The Commission noted WCBS's public service programming in this area, see text at note 2 *supra*, but said "the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking." *Id.* at 383.

8. Television Station WCBS-TV ("Applicability of the Fairness Doctrine to Cigarette Advertising"), 9 F.C.C.2d 921 (1967), hereinafter cited as "Cigarette Advertising."

9. The Commission explained that it could make its ruling without having before it the text of the particular commercials cited in Banzhaf's complaint, because the controversial issue was not whether smoking is dangerous to health but whether it is desirable. *Id.* at 946 n. 30. *And see id.* at 939. The Commission said it had been cited to "no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke," and found it "difficult to conceive of one [which would not do so]." *Id.* at 938.

10. *Id.* at 943.

11. *Id.* at 949.

12. Applicability of the Fairness Doctrine to Cigarette Advertising, 10 F.C.C.2d 16 (1967).

13. 79 Stat. 282 (1965), 15 U.S.C. §§ 1331–39 (Supp.1966).

each pack the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health" and provides that

> no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[14]

Since the Commission's ruling does not require the inclusion of any "statement * * * in the advertising of any cigarettes," but rather directs stations which advertise cigarettes to present "the other side" each week, it does not violate the letter of the Act.

But petitioners contend that, though Congress said only "no statement shall be required * * * in * * * advertising," it meant to forbid any regulation addressed to the smoking-health problem except the Federal Trade Commission's specifically exempted power to police false and misleading advertising.[15] In support of this proposition, they refer us primarily to the Act's Declaration of Policy, in which Congress asserts a purpose to

> establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[16]

From this declaration and from assorted snippets of legislative history, they conclude that Congress has definitively balanced the conflicting interests of the health of the public and the health of the economy and determined—in effect as a matter of law—that the public will be "adequately informed" on the smoking-and-health issue until July, 1969,[17] without any further governmental requirements.

The Commission, on the other hand, thought its ruling implemented a congressional policy of promoting intensive smoker-education during the life of the Act as an alternative to the "drastic step" of requiring warnings in every cigarette advertisement. Its opinion cites the express reliance in both House and Senate Reports on the anti-smoking campaigns of public and private groups as a reason for deferring stronger Congressional action.[18] And it notes that Congress itself appropriated $2 million to fund the extensive informational activities in this

14. Federal Cigarette Labeling and Advertising Act of 1965 (hereinafter "Act") § 5(b), 15 U.S.C. § 1334(b) (Supp.1966).

15. Section 5(c) of the Act states:
> Except as is otherwise provided * * *, nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes * * *.

15 U.S.C. § 1334(c) (Supp.1966).

16. Act, § 2, 15 U.S.C. § 1331 (Supp.1966).

17. Section 10 of the Act provides that the provisions "which affect the regulation of advertising" shall terminate on July 1, 1969. 15 U.S.C. § 1339 (Supp.1966).

18. The Senate Commerce Committee concluded:
> Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking.

S.Rep.No. 195, 89th Cong., 1st Sess., p. 5 (1965). *See also* H.R.Rep.No. 449, 89th Cong., 1st Sess. pp. 4–5 (1965), U.S.Code Congressional and Administrative News, p. 2350.

area of the Department of Health, Education and Welfare.[19]

This evidence does not establish unequivocally that Congress did not intend to rely exclusively on such non-coercive educational efforts to inform the public. Congress expressed no purpose in the Act of informing the public of anything except the bare fact that "cigarette smoking may be hazardous to health." Its prescribed warnings do that much and no more. They merely flash danger signals without either particularizing the danger or providing facts on which it may be appraised.

But the anti-smoking campaigns are scarcely so pervasive or so well-funded that additional information could be regarded as mere surfeit. Accordingly, if we are to adopt petitioners' analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression. Where a controversial issue with potentially grave consequences is left to each individual to decide for himself, the need for an abundant and ready supply of relevant information is too obvious to need belaboring.

[2] In the present case we find no such clear expression of restrictive intent. On the contrary, there are positive indications that Congress's "comprehensive program" was directed at the relatively narrow specific issue of regulation of "cigarette labeling and advertising." The Act was in fact passed in response to a pending Federal Trade Commission rule which would have required warnings both on packages and in all advertising.[20] Subjected to competing pressures and uncertain of the full extent of the health hazard, Congress apparently settled on half of the FTC's proposed loaf, shelved the other half for four years,[21] and expressly disclaimed any intent to affect other FTC policies or powers.[22] Nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation by other agencies—much less that it specifically meant to foreclose all such regulation.[23] If it meant to do anything so dramatic, it might reasonably be expected to have said so directly—especially where it was careful to include a section entitled "Preemption" specifically forbidding designated types of regulatory action.[24]

19. Cigarette Advertising, *supra* note 8, at 933.

20. On June 22, 1964, the Federal Trade Commission promulgated a proposed regulation requiring warnings on cigarette packs from January 1, 1965, and warnings in advertising as well from July 1, 1965, unless the package warnings and voluntary advertising reforms had changed the circumstances by then. 29 Fed.Reg. 8325 (1964). The next day the House Commerce Committee began hearings on various cigarette legislation which had been introduced in the House during the 88th Congress. Those hearings and that Congress adjourned without action, but the FTC acceded to the request of Chairman Harris to postpone the effective date of the package-warning rule to July 1, 1965, so that the new Congress might legislate. 29 Fed.Reg. 15570 (1964). The 89th Congress rushed into the breach with the Cigarette Labeling Act, and as a result the FTC rule was stillborn.

21. See Act, § 5(b), text at note 14, *supra*; § 10, *supra* note 17.

22. Act, § 5(c), *supra* note 15.

23. The only reference to other agencies besides the FTC in the entire Act is the declaration in Section 10 that the termination in 1969 of the provisions affecting the regulation of advertising "shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of the enactment of this Act." 15 U.S.C. § 1339 (Supp.1966). Since all other agencies are necessarily included in the blanket ban on required warnings in advertising, this negative provision is not evidence that the Act sweeps more broadly than its words import.

24. Act, § 5, 15 U.S.C. § 1334 (Supp.1966).

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[3–5] In short, we think the Cigarette Labeling Act represents the balance drawn between the narrow purpose of warning the public "that cigarette smoking may be hazardous to health" and the interests of the economy. In that reckoning, the question of the public's need for information about the nature, extent, and certainty of the danger was left out of the scales, and so is left unaffected, except incidentally, by the result. Congress may reasonably have concluded that a warning on each pack was adequate *warning*.[25] It surely did not think the warnings were themselves adequate *information*. And we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking.[26]

This relatively narrow reading of the Act is not in conflict with its declared objective of protecting commerce and the national economy against "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."[27] Congress patently did not want cigarette manufacturers harassed by conflicting affirmative requirements with respect to the content of their advertising. In addition, it evidently decided that the case against smoking was not yet so overwhelming as to warrant compelling the cigarette companies to dig their own graves by neutralizing their

25. Too many bare warnings might result in an uninformed and possibly unnecessary stampede away from cigarettes. While we will not assume that Congress wished to protect the economy at the expense of life and health, it clearly did wish to protect it to the maximum extent compatible with intelligent individual decisions on the health issue. Congress gave the benefit of every doubt to the possibility that the benefits of smoking might outweigh the potential danger to health; but that is not to say that it wished to conceal from the public the true extent of the danger. It is true that the anti-cigarette broadcasts required by the Commission's ruling may include uninformative propaganda as well as hard information. That possibility is a necessary consequence of the Commission's proper reluctance to dictate the content of broadcast material. See Part II, *infra*. But the ruling is reasonably designed to promote the diffusion of information; it is plainly not the substantial equivalent of the required "warnings" in advertisement which Congress has prohibited.

26. Apart from the declaration of policy to establish a "comprehensive" program—which is meaningful only after we discover what subject matter is comprehended—petitioners rely primarily on the broad scope of the congressional hearings from which the Act emerged. The Senate Commerce Committee heard wide-ranging testimony on all aspects of the smoking-health controversy, including the views of the FCC. Congress also considered proposals for more drastic congressional action than that taken by the Act. But the fact that Congress considered and declined to adopt broader legislation does not establish that it intended to bar otherwise-authorized agency action under established powers and duties.

Petitioners also make much of the fact that the FCC, through its Chairman, specifically told Congress that it had no present plans for regulatory action addressed to the smoking-health problem and that it preferred the across-the-board approach taken by the FTC. While it is possible that had the FCC then anticipated its cigarette ruling, Congress would have expressly prohibited it, that possibility must remain in the realm of speculation. We must decide questions of legislative intent by the lights we have, not by those we might have had.

Nor do we think the FCC's 1964 disclaimer of intent to deal with the cigarette problem deprives it of authority it would otherwise have had to do so now. It is not suggested that the FCC acted in bad faith. The 1964 statement came at a time when the FTC was conspicuously taking the lead our in attacking the problem on a media-wide front. The FCC may well have been reluctant in those circumstances to place a special burden on the communications industry. Primarily because of the Cigarette Labeling Act, the FTC's broad attack is now stalled. *Supra*, note 20. If the Act itself does not preempt FCC regulation, we see no reason why the FCC may not take the effects of the Act into account in assessing the need for its own action.

27. Act, § 2, text at note 16, *supra*.

own advertising messages.[28] Even if these policies implicitly preempt regulations *of advertising* substantially equivalent to the FTC's proposed required warnings,[29] they do not exclude a single, uniform regulation *of broadcasters* designed to inform the public.

II. The Commission's Authority under the Public Interest Standard of the Communications Act.

A fundamental question, of course, is whether the Commission's ruling, though not expressly forbidden by statute, is within the scope of its delegated authority. The ruling originated in response to a "fairness doctrine" complaint and held that the fairness doctrine applied to cigarette advertising. But in its opinion affirming the ruling, the Commission also asserted that it "clearly has the authority to make this public interest ruling" under the public interest standard of the Communications Act and relied upon "the licensee's statutory obligation to operate in the public interest." [30]

Last year in Red Lion Broadcasting Co. v. FCC,[31] we upheld the fairness doctrine in the face of arguments that it was unauthorized and unconstitutional. Since then, in Radio Television News Directors v. FCC,[32] the Seventh Circuit has held that the Commission's personal attack rules violate the First Amendment and, in so doing, has cast some doubt on the constitutionality of the underlying fairness doctrine.[33] These issues are now to be resolved by the Supreme Court.

In part for this reason, we do not think protracted discussion of the fairness doctrine will materially advance our inquiry. It is clear to us that, even if incorporated into the fairness doctrine, the ruling before us is to all intents a novel applica-

23. In the Congressional hearings on proposed cigarette legislation, tobacco industry spokesmen appeared to view the FTC's rule requiring them to include warnings in their advertising as uniquely obnoxious. One of them, for example, told the House Commerce Committee that
> the insistence upon a warning in advertising, in addition to the demand for a warning on labels, is punitive in nature. The right to advertise—an essential commercial right—is virtually destroyed if a manufacturer is required in every advertisement to disparage the product.

Hearings before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., p. 284 (1964).

29. The Commission thought the Act implicitly forbade a requirement that stations present warning statements immediately "adjacent" to each cigarette commercial. We need not decide whether such a requirement, though not a regulation of *advertising*, is so nearly identical to such a regulation in purpose and effect as to fall within the statute's prohibition.

30. Cigarette Advertising, *supra* note 8, 9 F.C.C.2d at 927.

31. 127 U.S.App.D.C. 129, 381 F.2d 908, cert. granted, 389 U.S. 968, 88 S.Ct. 470, 19 L.Ed.2d 458 (1967), argument postponed pending decision of the Seventh Circuit in Radio Television News Directors Ass'n v. United States (*infra* note 32), 390 U.S. 916, 88 S.Ct. 857, 19 L.Ed.2d 982 (1968).

32. 400 F.2d 1002 (7 Cir., decided September 10, 1968).

33. The Court of Appeals distinguished the personal attack rules from the underlying fairness doctrine on two grounds. First, the rules represent an unusual particularization of the doctrine, since they impose detailed tests for determining which individual broadcasts trigger the stations' duty to provide reply time and since, unlike the cigarette ruling, they also leave the stations little discretion as to how that duty may be fulfilled. Second, the personal attack rules are enforceable by penalties for individual infractions rather than solely by consideration of a station's overall performance in the proceedings for renewal of a license. Radio Television News Directors Ass'n v. United States (FCC), *supra* note 32 (400 F.2d pp. 1013–1014). Nonetheless, the court expressly refused to decide the constitutionality of the fairness doctrine itself. *Id.*, 400 F.2d 1017. It did decide that the objective of a fair and balanced presentation of issues of public importance does not justify rules which are likely to inhibit public debate on political issues and might, by their vagueness, set up the Commission as a de facto censor of individual editorial and political broadcasts. This holding cuts very near the heart of the fairness doctrine. See Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

tion. In only one instance has the Commission previously held the advertising of a consumer product subject to the rule that broadcasters' presentations of controversial public issues must be fair and balanced.[34] The narrow issue presented by the facts of that case was whether a station in the temperance belt which advertised alcoholic beverages could, consistently with the principles now known as the fairness doctrine, refuse to accept anti-liquor advertising from temperance groups.[35] The case has not been followed in the twenty years since it was decided. It is not in any event a clear precedent for a ruling which instructs stations to broadcast opposition to their paid commercials regardless of whether opponents buy—or even request—such broadcast time. In addition, except for the personal attack rules struck down by the Seventh Circuit,[36] we know of no case in which the Commission has so specifically defined the stations' duties under the fairness doctrine.[37]

We also note that elsewhere the Commission has been hesitant to invoke the fairness doctrine where a controversial issue is raised only by implication.[38] Finally, the Commission itself concluded that its main point would be lost if the legal debate concentrated too intensely on the "specifics of the fairness doctrine." [39]

None of the novel aspects of the ruling, of course, precludes an extension of the fairness doctrine at this time. But the extension must, like the doctrine itself, find its authority in the public interest standard. Thus, whether the ruling is viewed as a new application of the fairness doctrine or as an independent public interest ruling, the ultimate question is the same. Moreover, in view of the constitutional attack on the doctrine, the specific question of greatest long-term importance may be whether the cigarette ruling can stand on its own feet.

In fact, we think the best statement of the Commission's holding and rationale is contained in the summary paragraph introducing the "Conclusions" section of its opinion:

> There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" * * * is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a

34. Petition of Sam Morris, 11 F.C.C. 197 (1946). This opinion in fact predates the first formal articulation of the policies now known as the "fairness doctrine" in the 1949 Report of the Commission in the Matter of Editorializing by Broadcast Licensees, *supra* note 33. But the basic requirement of fair and balanced presentation of controversial issues of public importance dates from decisions of the old Radio Commission and from the early rulings of the FCC. See Red Lion Broadcasting v. FCC, *supra* note 31, 127 U.S. App.D.C. at 138–139, 381 F.2d at 917–918, and cases cited therein.

35. The Commission observed, "[I]t can at least be said that the advertising of alcoholic beverages can raise substantial issues of public importance," and concluded that the issue of whether or not to drink "may assume the proportions of a controverted issue of public importance." 11 F.C.C. at 199. It did not, however, deny renewal of the respondent station's license for failure to provide time to the temperance advocates.

36. Radio Television News Directors Ass'n v. United States (FCC), *supra* note 32.

37. The Commission has, upon rare occasion, identified specific issues it regards as controversial. *E.g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, 3 P & F Radio Reg. 259 (1946). But it has not previously gone so far as to prescribe the frequency with which opposing views must be broadcast.

38. The Commission has refused to require reply time for atheists who wish to respond to the implicit theism of broadcast church services. Mrs. Madalyn Murray, 5 P & F Radio Reg.2d 263 (1965). *But see*, Robert Harold Scott, *supra* note 37.

39. Cigarette Advertising, *supra* note 8, 9 F.C.C.2d at 949.

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serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it. * * * But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.[40]

The fairness doctrine, we think, serves chiefly to put flesh on these policy bones by providing a familiar mold to define the general contours of the obligation imposed.

The attack on the alleged statutory authority for this "public interest" ruling takes two forms: (1) a general denial that the Commission has any authority to supervise the content of broadcasting under the public interest standard; and (2) an argument that any delegation of the power to make ad hoc public interest determinations of this kind is invalid for want of adequate limiting standards.

A. *The Commission's authority over broadcast content in general*

Nothing in the Communications Act of 1934[41] expressly grants the Commission any general authority over programming. The most relevant provisions go no further than to authorize it to grant and renew broadcast licenses according to the dictates of the "public interest, convenience, and necessity."[42] A case could be made, as an abstract proposition, that this licensing power is limited to policing the traffic over the airwaves to prevent interference between stations and perhaps to assure a minimum level of technical competence. If the question were *res nova*, that case would receive substantial support from the Supreme Court decisions requiring a clear mandate for regulatory activity which brushes closely against sensitive constitutional areas.[43]

[6] But the argument was in fact made and rejected long ago in National Broadcasting Company v. United States.[44] Justice Frankfurter, speaking for the Court, said in part:

"An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869, 1037. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio [*sic*], comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." * * *

40. *Id.*

41. 47 U.S.C. § 301 *et seq.* (1964).

42. 47 U.S.C. § 307(a), (d) (1964).

43. Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); Hannegan v. Esquire, Inc., 327 U.S. 146, 66 S.Ct. 456, 90 L.Ed. 586 (1946).

44. 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943).

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> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. * * *
>
> These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." [45]

In fact, neither courts nor Commission have thought it had to make its decisions among competing applicants blindfolded to the content of their programs.[46] Both the old Radio Commission and the FCC have likewise refused to renew licenses on the basis of past programming not in the public interest,[47] and this Court affirmed such a refusal as long ago as 1931.[48] If agency power to designate programming "not in the public interest" is a slippery slope, the Commission and the courts started down it too long ago to go back to the top now unless Congress or the Constitution sends them. But Congress has apparently specifically endorsed this understanding of the public interest.[49] And whatever the limits im-

45. *Id.* at 217, 63 S.Ct. at 1010.

46. In Simmons v. FCC, 83 U.S.App.D.C. 262, 264, 169 F.2d 670, 672, *cert. denied*, 335 U.S. 846, 69 S.Ct. 67, 93 L.Ed. 396 (1948), this court said:

> [W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.

See also, e.g., Henry v. FCC, 112 U.S.App.D.C. 247, 302 F.2d 191, cert. denied, 371 U.S. 821, 83 S.Ct. 37, 9 L.Ed.2d 60 (1962); Allen B. Dumont Laboratories v. Carroll, 184 F.2d 153, 156 (3 Cir. 1950); Bay State Beacon v. FCC, 84 U.S.App.D.C. 216, 171 F.2d 826 (1948). *See generally* Note, "Regulation of Program Content by the FCC," 77 HARV.L.REV. 701 (1964) and numerous cases cited therein. Also noteworthy in this regard is the concurring opinion of Justice Brennan in Head v. New Mexico Board of Examiners, 374 U.S. 424, 433, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963), which grapples at length with the possibility that the FCC's authority to regulate advertising content is so complete as to exclude any state regulation in that area. Justice Brennan concludes that not all state regulation is excluded, but observes that Congress's "failure expressly to regulate *nondeceptive* advertising surely does not deprive the FCC of all such jurisdiction * * *" *Id.* at 444, 83 S.Ct. at 1771.

47. Community Broadcasting Service, 13 P & F Radio Reg. 170 (1955); Port Frere Broadcasting Co., 5 P & F Radio Reg. 1137 (1950); Trinity Methodist Church, South v. Federal Radio Commission, 61 U.S.App.D.C. 311, 62 F.2d 850 (1932); cert. denied, 288 U.S. 599, 53 S.Ct. 317, 77 L.Ed. 975 (1933); KFKB Broadcasting Ass'n v. Federal Radio Commission, 60 App.D.C. 79, 47 F.2d 670 (1931).

48. In *KFKB Broadcasting Ass'n*, *supra* note 47, this court upheld the denial of a license to a station which regularly broadcast a program in which a doctor diagnosed illnesses and prescribed medicines on the basis of symptoms described in listeners' letters. The grounds for denial were both that the doctor, who controlled the station, was using it for his own private interests and also that the "medical question box" program was "inimical to the public health and safety, and for that reason [was] not in the public interest." 60 App.D.C. at 80, 47 F.2d at 672. The court said:

> It is apparent, we think, that the [broadcasting] business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the Commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for "by their fruits shall ye know them." Matt. VII:20.

Id. at 81, 47 F.2d at 672. *Accord*, Trinity Methodist Church, South, *supra* note 47.

49. In 1959, Congress amended the provision requiring broadcasters to provide equal

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posed by the First Amendment, we do not think it requires eradicating every trace of a programming component from the public interest standard.[50]

The power to refuse a license on grounds of past or proposed programming necessarily entails some power to define the stations' public interest obligations with respect to programming. It is this power to specify material which the public interest requires or forbids to be broadcast that carries the seeds of the general authority to censor denied by the Communications Act[51] and the First Amendment alike. But elementary canons of administrative and constitutional law prevent the Commission from terminating a license without giving reasons or from condemning a station's overall programming as inimical to the public interest without identifying the offending material and particularizing the public interest. And if the Commission must explain its view of the public interest when it denies or revokes a license, it may surely give advance notice of its views by way of an official ruling which is subject to judicial review. Indeed, in some cases fairness to the stations may require some advance warning of their responsibilities.

[7] Thus, in applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative duties—*e. g.*, to strike a balance between the various interests of the community,[52] or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues.[53] The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made.[54] In practice, the Commission rarely denies licenses for breaches of these duties.[55] Given its long-established authority to consider program content, this general approach probably minimizes the dangers of censorship or pervasive supervision.

In other areas, however, the Commission has on occasion imposed more specific duties or found specific programs or

time to opponents of candidates for public office who use their stations, 47 U.S.C. § 315 (1964), in order to exempt bona fide newscasts, news interviews, news documentaries, etc., from that requirement. In so doing it included the proviso that nothing in the exemption

> shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from *the obligation imposed upon them under this chapter to operate in the public interest* and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

73 Stat. 557 (1959), 47 U.S.C. § 315(a) (1964) (emphasis added). At the very least, this language appears to be an acknowledgment of and acquiescence in the settled Commission and judicial construction that the public interest standard applies to program content.

50. *Infra*, Part III.

51. Section 326 of the Communications Act of 1934 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship * * *, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (1964).

52. Editorializing by Broadcast Licensees, *supra* note 33, 13 FCC at 1247–48.

53. *Id.* at 1249.

54. *Id.* at 1251–1252.

55. "Generally, where objectionable matter has been broadcast in particular instances, renewal of licenses has been granted, usually upon a showing that program services were otherwise meritorious and in the public interest and the objectionable matter discontinued. * * *" Note, "Governmental Regulation of the Program Content of Television Broadcasting," 19 G.W.L.Rev. 312, 317 (1950). *See also* Note, "Regulation of Program Content by the FCC," *supra* note 46, at 703–704.

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advertisements to be contrary to the public interest.[56] Such rulings must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship. But particularity is not in itself a vice; indeed, in some circumstances it may serve to limit an otherwise impermissibly broad intrusion upon a licensee's individual responsibility for programming.

B. *The authority for the cigarette ruling in particular*

[8–10] Thus, in the context of the Communications Act as it has long been understood, we do not think that public interest rulings relating to specific program content invariably amount to "censorship" within the meaning of the Act.[57] However, there is high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.[58]

[11] The ruling before us neither forbids nor requires the publication of any specific material. But as an extension of the fairness doctrine it is an unusual limitation of the licensee's discretion. And as an independent public interest ruling it requires independent support. We cannot uphold it merely on the ground that it may reasonably be thought to serve the public interest.

Whatever else it may mean, however, we think the public interest indisputably includes the public health.[59] There is

56. *E. g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, *supra* note 37; KFKB Broadcasting Ass'n v. Federal Radio Commission, Trinity Methodist Church, South v. FCC, and Port Frere Broadcasting Co., all *supra* note 47; Mile High Station, Inc., 20 P & F Radio Reg. 345 (1960); WSBC, Inc., 2 F.C.C. 293 (1936); Oak Leaves Broadcasting, 2 F.C.C. 298 (1936); Farmers & Bankers Life Insurance Co., 2 F.C.C. 455 (1936); and cases cited in Note, "Governmental Regulation of the Program Content of Television Broadcasting," *supra* note 55, at 317 n. 27, 317–318 n. 28.

57. See note 51, *supra*. It is not clear whether Congress originally thought that such rulings as to program content would constitute "censorship." See Note, 46 HARV.L.REV. 987, 990 (1933). But in view of the settled administrative practice of issuing such rulings and opinions, the doubtful issue of construction must be resolved in the negative. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

58. The Supreme Court has suggested that the "public interest" standard may be narrowed by interpreting it in the light of "its context, * * * the nature of radio transmission and reception, [and] * * * the scope, character, and quality of services * * *." Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 285, 53 S.Ct. 627, 629, 77 L.Ed. 1166, 89 A.L.R. 406 (1933). While these criteria may be sufficiently precise administrative standards to govern regulation of technical performance and selection among competing applicants, however, we think they are too amorphous, without more, to support supervision over programming.

59. Petitioners WTRF-TV and the National Association of Broadcasters argue that, if the FCC has any authority with respect to advertising, it can apply only the more specific standard Congress has established to guide the Federal Trade Commission, which they say is vested with "primary" authority to regulate advertising. Thus, they would limit the FCC's role to policing "unfair methods of competition * * * and unfair or deceptive acts or practices," Federal Trade Commission Act § 5 (1914), 15 U.S.C. § 45(a) (1964), at least absent any considerations peculiar to broadcasting. Their sole authority for that proposition is FCC v. American Broadcasting Co., 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954). That case, however, is not in point. There, the FCC had adopted regulations disapproving of give-away programs on the ground that they were "lotteries" within the meaning of federal prohibitory statutes. The Supreme Court reversed on the ground that the FCC had misread the criminal statutes, but that reversal did not in itself preclude FCC authority to prohibit such programs as inconsistent with the public interest. SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943). In any case, the standard of the Federal

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perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest. The power to protect the public health lies at the heart of the states' police power. It has sustained many of the most drastic exercises of that power, including quarantines, condemnations, civil commitments, and compulsory vaccinations. Likewise, public health concerns now support a sizable portion of the civilian federal bureaucracy. The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends.

[12] The Radio Commission, predecessor to the FCC, assumed with judicial approval and without question that broadcasting of specious medical information was not in the public interest.[60] In the Communications Act of 1934, Congress transferred the Radio Commission's authority to license in the "public interest, convenience and necessity" to the FCC,[61] which has also ruled specific controversial health claims to be not in the public interest.[62] Given the premise that the "public interest" may include some of the content as well as the technical quality of broadcasting, we are satisfied that it includes the public health. But were there any initial doubt, in the absence of evidence to the contrary we think Congress must be deemed to have acquiesced in the determinations to that effect of both Commissions on a matter of such basic and universally recognized importance.

The public health standard removes much of the vagueness and over-breadth attending the standard of the public interest. But we are not prepared to say that the Commission is authorized to condemn every broadcast which might, without arbitrariness or caprice, be thought to pose some danger to the public health. Even the relatively precise concept of the public health is murky at the fringes, and in some cases what is concededly optimal health may be a less important public value than other conflicting interests. Finally, the Commission itself has no special expertise to make it the appropriate arbiter of controversies over whether particular broadcasting is dangerous to health.

But the ruling on cigarette advertising is vulnerable to none of these objections against a broad mandate to the Commission to consider the public health.[63] The danger cigarettes may pose to health is, among others, a danger to life itself. As the Commission emphasized, it is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group. Moreover, the danger, though not established beyond all doubt, is documented by a compelling cumulation of statistical evidence. The only member of the Commission to express doubts about the validity of its ruling had no doubts about the validity of its premise that, in all probability, cigarettes are dangerous to health:[64]

Trade Act is applicable only to regulation of advertising. While the obligations imposed under the cigarette ruling arise from and are conditioned upon the broadcasting of cigarette advertising, the ruling does not regulate advertising. Rather, it has the effect of regulating stations which carry advertising by requiring them to inform the public.

60. KFKB Broadcasting Ass'n v. Federal Radio Commission, *supra* note 47.

61. 47 U.S.C. § 307 (1964).

62. WSBC, Inc., Oak Leaves Broadcasting, Inc., Farmers & Bankers Life Insurance Co., all *supra* note 56.

63. We agree with the Commission that "cigarette advertising presents a unique situation," and we note that the Commission "do[es] not now know" of any other advertised product which would warrant a comparable ruling. Cigarette Advertising, *supra* note 8, 9 F.C.C.2d at 943.

64. The Commission correctly noted that it "is not the proper arbiter of the scientific

> Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smoking is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of Government agencies, and by Congressional reports and statute. * * * The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probabli tic (sic) * * * Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt. * * * The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt.[65]

Finally, the Commission expressly refused to rely on any scientific expertise of its own.[66] Instead, it took the word of the Surgeon General's Advisory Committee,[67] whose findings had already been adopted in substance by the Department of Health, Education and Welfare,[68] the Federal Trade Commission,[69] and the Senate Commerce Committee,[70] and had in addition been recognized and acted upon by Congress itself in the Cigarette Labeling Act.

In these circumstances, the Commission could reasonably determine that

and medical issue * * * and of course has not sought to resolve it." *Id.* at 949. But the "controversial issue" to which its ruling is addressed is not whether cigarette smoking is dangerous, but whether, in view of its authoritatively documented dangers, it is desirable:

> It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke, but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose.

Id. at 939.

65. *Id.*, concurring opinion of Commissioner Loevinger at 952–953.

66. See note 64, *supra*.

67. On January 11, 1964, the report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."
Cigarette Advertising, *supra* note 8, Appendix A at 950.

68. The Department promptly established the National Interagency Council on Smoking and Health in order, *inter alia*, to

> use its professional talents to bring to the Nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking. * * *

Id., Appendix A at 951. In 1967, HEW also released the Surgeon General's "Report on Current Information on the Health Consequences of Smoking," which reaffirmed the conclusions of the 1964 Report, *supra* note 67, on the basis of more than 2,000 subsequent research studies. This report asserted that cigarette smokers have substantially higher death and disability rates than comparable non-smokers and that a substantial number of earlier deaths and disabilities would not have occurred if the victims had never smoked. *Id.* at 936–937.

69. Note 20, *supra*.

70. While there remain [sic] a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.
S.Rep.No. 195, 89th Cong., 1st Sess., p. 3 (1965).

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news broadcasts, private and governmental educational programs, the information provided by other media, and the prescribed warnings on each cigarette pack, inadequately inform the public of the extent to which its life and health are most probably in jeopardy. The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred "yeses" for each "no," when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. Moreover, since cigarette smoking is psychologically addicting, the confirmed smoker is likely to be relatively unreceptive to information about its dangers; his hearing is dulled by his appetite. And since it is so much harder to stop than not to start, it is crucial that an accurate picture be communicated to those who have not yet begun.

Thus, as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken. In view of the potentially grave consequences of a decision to continue—or above all to start—smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly. The Commission has made no effort to dictate the content of the required anti-cigarette broadcasts. It has emphasized that the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee.[71]

[13] The cigarette ruling does not convert the Commission into either a censor or a big brother. But we emphasize that our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the "public interest" or even the "public health."

III. The First Amendment

It is difficult to separate the First Amendment question from the question of the Commission's authority. Section 326 of the Communications Act expressly provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."[72] It might reasonably be thought that "the right of free speech," is shorthand for the First Amendment. But since constructions of the First Amendment have broadened since 1934, and inasmuch as the First Amendment argument advanced in this case challenges a long-settled construction of the Act, we treat the constitutional question separately for purposes of analysis.

A. *Regulation of broadcast content under the First Amendment in general*

[14] Intervenors NBC, *et al.* argue cogently that the public interest standard cannot constitutionally now include any component of program content. They say the First Amendment obviously would not tolerate administrative supervision of the material published by the newspaper press. The radio press was initially treated differently only because (1) peculiar technical factors require a policeman to prevent interference between different stations, and (2) the then available broadcasting channels were so limited in number that the Commission could hardly ignore all considerations of the nature and quality of programming in choosing among applicants. The first reason does not justify supervision of content, they say, and the second, if ever sufficient, is an anachronism now that the available channels often outnumber the applicants and the broadcasting stations serving most areas far outnumber

71. Cigarette Advertising, *supra* note 8, at 941-942.

72. *Supra* note 51.

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the newspapers.[73] Accordingly, in their view the First Amendment now limits the Commission's licensing discretion to technological considerations; the content of broadcasting, like that of the publishing press, must be left entirely to the licensees and ultimately to the market.

This argument has considerable force. First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for *some* regulation of broadcasting and the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege." [74] It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.

On the other hand, we cannot solve such complex questions by replacing one set of shibboleths with another. The First Amendment is unmistakably hostile to governmental controls over the content of the press,[75] but that is not to say that it necessarily bars every regulation which in any way affects what the newspapers publish. Even if it does, there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment. Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets.[76] Moreover, the broadcasting medium may be different in kind from publishing in a way which has particular relevance to the case at hand. Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be

73. See Radio Television News Directors Ass'n v. United States (FCC) *supra*, note 32, 400 F.2d pp. 1018–1020, where the Seventh Circuit declared that the historical distinction between press and broadcasting is untenable for First Amendment purposes.

74. See G. Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulations, 52 MINN.L.REV. 67, 152 (1967).

75. *E.g.*, Near v. State of Minnesota, ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

76. It has also been suggested that a difference in the working of the market mechanism in the two media may justify a difference in the scope of permissible regulation under the First Amendment. It is in a newspaper's economic interest, it is said, to include features which may appeal only to a limited or specialized audience. The cost of adding a page to include special features is relatively small compared to the advertising and subscription revenue which may be expected from the resulting increase in circulation. But a broadcaster can appeal to only one audience at a time. If he devotes an hour to programs appealing to a minority taste, he foregoes the chance to compete for the greater advertising revenues consequent upon reaching a larger audience. Accordingly, it may be that even newspaper monopolies are more likely than broadcasters to serve the entire public without regulatory prodding. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 714. For support from economists for the proposition that broadcasters will compete for the majority audience at the expense even of a sizable minority taste, see J. Dirlam and A. Kahn, The Merits of Reserving the Cost-Savings from Domestic Communications Satellites for Support of Educational Television, 77 YALE L.J. 494, 515–517 (1968).

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thought greater than the impact of the written word.[77]

B. *Constitutionality of the cigarette ruling in particular*

[15] These considerations are at least sufficient to convince us that we are not obliged simply to "invalidate the entire course of broadcasting development" [78] with no inquiry into the particulars of the ruling before us. Rather, we think the proper approach to the difficult First Amendment issues petitioners raise is to consider them in the context of individual regulatory policies and practices on a case-by-case basis. On this approach, since the narrow public health power which supports the cigarette ruling does not "sweep * * * widely and * * indiscriminately" across protected freedoms,[79] the constitutional question before us is only whether the Communications Act, construed to authorize a public health ruling in the circumstances of this case, offends the First Amendment. And whatever the constitutional infirmities of other regulations of programming, we are satisfied that the cigarette ruling does not abridge the First Amendment freedoms of speech or press. We reach this conclusion in the light of the following considerations:

(1) The cigarette ruling does not ban any speech. In traditional doctrinal terms, the constitutional argument against it is only that it may have a "chilling effect" on the exercise of First Amendment freedoms by making broadcasters more reluctant to carry cigarette advertising.

(2) The speech which might conceivably be "chilled" by this ruling barely qualifies as constitutionally protected "speech." It is established that some utterances fall outside the pale of First Amendment concern.[80] Many cases indicate that product advertising is at least less rigorously protected than other forms of speech.[81] Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process,

77. The effectiveness of the television commercial is hardly disputed, for it alone appeals to both of man's most receptive senses—hearing and seeing. * * * Psychological memory experiments indicate strongly that people tend to remember advertising messages presented by a combination of visual and auditory methods significantly more than those presented by either method alone. See *e.g.*, Elliott, Memory for Visual Auditory, and Visual-Auditory Material, 29 ARCHIVES OF PSYCHOLOGY No. 199, at 52–54 (1936). Note, "Illusion or Deception: The Use of 'Props' and 'Mock-ups' in Television Advertising," 72 YALE L.J. 145, 156 n. 46 (1962). See generally, V. Packard, THE HIDDEN PERSUADERS (1957).

78. Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

79. Aptheker v. Secretary of State, 378 U. S. 500, 514, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964).

80. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

81. Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); Breard v. City of Alexandria, 341 U.S. 622, 642, 71 S.Ct. 920, 95 L.Ed. 1233, 35 A.L.R.2d 335 (1951); Murdock v. Pennsylvania, 319 U.S. 105, 110–111, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); Martin v. City of Struthers, 319 U.S. 141, 142 n. 1, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); Jamison v. Texas, 318 U.S. 413, 417, 63 S.Ct. 669, 87 L.Ed. 869 (1943). In Head v. New Mexico Board of Examiners, the Supreme Court upheld as a health measure a state law prohibiting price-advertising by optometrists. 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963). It did not reach the First Amendment question because that question had not been properly raised in the state court. *Id.* at 433 n. 12, 183 S.Ct. 1759. However, in a lengthy concurring opinion, supra note 46, Justice Brennan considered the principal issue to be whether in the Communications Act Congress had occupied the field of regulation of broadcast advertising. *Id.* at 433 *et seq.*, 83 S.Ct. 1759. There was no dissent. The Court's collective treatment of this case strongly discounts the possibility that it thought such regulation poses serious constitutional problems.

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does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices. In the instant case, this argument is not dispositive because the cigarette ruling was premised on the fact that cigarette advertising implicitly states a position on a matter of public controversy. But though this advertising strongly implies that cigarette smoking is a desirable habit, petitioners have correctly insisted that the advertisements in question present no information or arguments in favor of smoking which might contribute to the public debate. Accordingly, even if cigarette commercials are protected speech, we think they are at best a negligible "part of any exposition of ideas, and are of * * * slight social value as a step to truth * * *."[82]

(3) In any event, the danger that even this marginal "speech" will be significantly chilled as a result of the ruling is probably itself marginal. We cannot, of course, undertake an economic analysis to determine the probability that the volume of cigarette advertising over radio and television will decline. We can say with fair certainty, however, that the cigarette manufacturers' interest in selling their product guarantees a continued resourceful effort to reach the public. We note also that cigarette advertising accounts for a sizable portion of broadcasting revenues,[83] and we think it at best doubtful that many stations will refuse to carry cigarette commercials in order to avoid the obligations imposed by the ruling.[84]

(4) Even if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss. A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance.[85] That policy has been pursued by a general hostility toward any deterrents to free expression. The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often. Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal.

Countervailing power on the opposite sides of many issues of public concern often neutralizes this defect. In many other cases, the courts must act as if such an inherent balancing mechanism were at work in order to avoid either weighing the worth of conflicting views or emasculating the robust debate they seek to promote. If the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may

82. Chaplinsky v. New Hampshire, *supra* note 80, 315 U.S. at 572, 62 S.Ct. at 769.

83. The briefs indicate that radio and television revenues from cigarette advertising total nearly $300,000,000 annually and account for more than 7% of all television advertising revenue.

84. The Commission has in fact promised to "tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry." Cigarette Advertising, *supra* note 8, at 944.

85. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 148–150, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (opinion of Justice Harlan); New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964); NAACP v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

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be to insure no presentation, or no vigorous presentation, at all.[86] But where, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.[87]

(5) Finally, not only does the cigarette ruling not repress any information, it serves affirmatively to provide information. We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition. But the cigarette ruling does not dictate specific content and, in view of its special context, it is not a precedent for converting broadcasting into a mouthpiece for government propaganda. And the provision of information is no small part of what the First Amendment is about. A political system which assigns vital decisions to individual free choice assumes a well-informed citizenry. We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision to smoke or not to smoke.

IV. Other Contentions

[16–18] The resolution of these basic questions leaves a residue of unanswered contentions. Mr. Banzhaf's complaint that the anti-smokers should have been granted equal time need not detain us. Even if it had authority to specify equal time, the Commission could reasonably find such a specific requirement an unnecessary intrusion upon the licensees' discretion. Likewise, the Commission did not abuse its discretion in refusing to require rebuttal time for the cigarette manufacturers. The public health rationale which supports the principal ruling would hardly justify compelling broadcasters to inform the public that smoking might *not* be dangerous. And an issue of "fairness" arises principally because the cigarette manufacturers are deterred from making health claims in their advertisements by the FTC's warning that such claims would be "unfair and deceptive."[88] If the FTC's determination is in error, the remedy does not lie in a further particularization of the FCC's fairness doctrine.

86. The main thrust of the Seventh Circuit opinion invalidating the FCC's personal attack rules under the First Amendment is that "strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules." Radio Television News Directors Ass'n v. United States (FCC), *supra* note 32, 400 F.2d p. 1014. The rules themselves, the Court said, "reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills." *Id.*, p. 1014. Thus, the Court was concerned that both the amount and the vigor of debate might be reduced.

87. *Cf.* Radio Television News Directors Ass'n v. United States (FCC), *supra* notes 32 and 86: "[T]he rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting * * * and that it is unable to attain such fairness by less restrictive and oppressive means." (p. 1020). In the instant case, we think that on balance First Amendment interests are advanced by the Commission's ruling. Moreover, the additional public interest at stake is compelling. And the technique of requiring the presentation of opposing views is markedly less "restrictive and oppressive" than many attacks on the cigarette-health problem which might well be within the power of federal agencies, but for the Cigarette Labeling Act.

88. *E.g.*, FTC, Order Vacating Trade Regulation Rule, 30 Fed.Reg. 9484, 9485 (1965). Industry codes also disapprove of affirmative health claims in cigarette advertising, but in the circumstances we hardly think this self-regulation makes out a sufficient case to require compensatory relief from the FCC.

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[19, 20] Finally, The Tobacco Institute contends that the Commission's ruling is void on account of procedural irregularities. The initial ruling was made without providing interested parties either notice or an opportunity to be heard. But since the Commission subsequently entertained numerous petitions for review, wrote a thorough opinion affirming its ruling, and made the ruling prospective from the date of the affirming order, we find no prejudice to substantial rights. The Tobacco Institute also intimates that the Commission should have held an oral hearing, should have made factual investigations of its own, or should have instituted a full-fledged rule-making proceeding, before issuing its ruling. As a general rule, we agree that more careful procedures are required to support innovation by an administrative agency. But the essential premises of the instant ruling are only (1) that cigarette advertising inherently promotes cigarette smoking as a desirable habit, (2) that very substantial medical and scientific authority regards this habit as highly dangerous to health and therefore undesirable, and (3) that in view of the volume of cigarette advertising, existing sources were inadequate to inform the public of the nature and extent of the danger. These premises are supported by the record. We do not see, and The Tobacco Institute has never suggested, what evidence a more extensive proceeding might have produced to refute them.

Affirmed.

WILBUR K. MILLER, Senior Circuit Judge:

I concur in the affirmance of No. 21,285, Banzhaf v. Federal Communications Commission and United States, but I dissent from the affirmance of Nos. 21,525–6, WTRF-TV v. Federal Communications Commission and United States, and from the affirmance of No. 21,577, Tobacco Institute, Inc. v. Federal Communications Commission and United States.

George W. BATES, Appellant,
v.
UNITED STATES of America, Appellee.
No. 21434.

United States Court of Appeals
District of Columbia Circuit.

Argued Oct. 23, 1968.

Decided Dec. 13, 1968.

Defendant was convicted on two counts of housebreaking and on two counts of assault with a dangerous weapon. The United States District Court for the District of Columbia, John J. Sirica, J., rendered judgment, and the defendant appealed. The Court of Appeals, Burger, J., held that where an intruder broke into apartment of two women, and shortly thereafter defendant was arrested as a suspect, and about 30 minutes after the attack the women were asked to come down to the street in front of their apartment and view defendant who was sole occupant of patrol wagon, use of "one-man showup" did not deny defendant due process of law.

Affirmed.

1. Criminal Law ⇐339

There is no prohibition against viewing of a suspect alone in what is called a one-man showup when it occurs near time of alleged criminal act.

2. Constitutional Law ⇐266

Where an intruder broke into apartment of two women, and shortly thereafter defendant was arrested as a suspect, and about 30 minutes after the attack the women were asked to come down to the street in front of their apartment and view defendant who was sole occupant of patrol wagon, use of "one-man showup" did not deny defendant due process of law. D.C.C.E. §§ 22–502, 22–1801.

METROMEDIA, INC.
Washington, D. C.

FCC 69-272
29120
March 20, 1969

[¶10:315] Cigarette advertising.

Licensee of TV station which broadcast, in September 1968, a large number of cigarette commercials during "prime time" and comparatively few anti-smoking messages during such time is required to make a greater effort to inform listeners of the health hazards. Metromedia, Inc., 15 RR 2d 1063 [1969].

This refers to a complaint filed on October 2, 1968 against Station WNEW-TV, alleging a failure to comply with the requirements of the Commission's cigarette advertising policy, set forth in Applicability of the Fairness Doctrine to Cigarette Advertising, 9 FCC 2d 921 [11 RR 2d 1901] (1967), affirmed, John Banzhaf III v. FCC, Case No. 21285, CA DC, November 21, 1968 [14 RR 2d 2061] petition for rehearing pending.

The above policy requires that a broadcast licensee presenting cigarette commercials, which ". . . convey any number of reasons why it appears desirable to smoke . . . " – must ". . . devote a significant amount of time to informing the listeners of the other side of the matter – that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user." (9 FCC 2d at 939). At the same time, we stressed that we would implement the requirement in such a way as not to drive cigarette commercials off the air – a result which would be inconsistent with the Congressional direction in the Cigarette Labelling and Advertising Act.

We have reviewed the facts of this case in the light of the above policies, and find that if the matter were viewed on the basis of the entire broadcast day there would be no basis to the complaint. We note, however, that in the sample period (September 1968) although the vast majority of your cigarette commercials were broadcast during the hours which you define as "prime time," comparatively few of your anti-smoking messages were broadcast during these hours, and none were broadcast on 13 of the 30 days.

We recognize that in view of the considerations set forth in the last sentence of the second paragraph, parity between cigarette commercials and anti-smoking messages cannot be required during these hours, and that implementation of our policy requires a sensitive balancing. Without setting down any mathematical formula, and recognizing that you have been making substantial efforts to inform listeners of the health hazards, we nevertheless believe that greater effort is called for during the periods of maximum viewing. We therefore request that within sixty days of the date of this letter you submit a statement of your future policies in this area and that, after the passage of a period of four months from the issuance of this letter, you submit a report on your efforts to implement such policies.

This letter was adopted by the Commission on March 19, 1969. Commissioner Cox concurred in the adoption of the letter but would, in addition, have indicated that the licensee should have maintained approximately the same ratio between cigarette commercials and anti-smoking messages in all periods of the broadcast day. Commissioner Johnson dissents, with statement. Commissioner Wadsworth dissented.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

On October 2, 1968, the Commission received a complaint that WNEW-TV, New York, had broadcast numerous pro-cigarette commercials but "no" anti-smoking announcements. Following a Commission request, Metromedia, licensee of WNEW-TV, submitted information to the Commission indicating the number of pro-cigarette commercials to anti-smoking announcements during the prime-time period of 7:30 p.m. to 11:00 p.m. was on the order of 7 to 1.

Analysis of the Metromedia figures revealed that no anti-smoking announcements were broadcast by WNEW-TV during prime-time hours on 19 of the 30 days in September, and that during these hours 63 pro-cigarette commercials were broadcast. During a seven-day consecutive period within this month of September, no anti-smoking announcements were broadcast at all, while 27 pro-cigarette commercials were programmed. In other words, during one entire week of September, the ratio of pro-cigarette commercials to anti-smoking announcements in prime-time was 27 to 0; and during 19 days of September – over one-half of the entire month – this ratio was 63 to 0.

Despite this abysmal lack of compliance with Commission policies, WNEW-TV is today given only a mild reproach by the majority. I dissent.

I have detailed my objections to the majority's rather cavalier treatment of its fairness doctrine with respect to pro-cigarette commercials elsewhere, and will not repeat them here. (See dissenting opinions in "In the Matter of Petition to Revoke the License of National Broadcasting Company, Inc. for Station WNBC-TV, New York, New York," FCC 69-270 (1969), and "In re Application of Westinghouse Broadcasting . . . ." FCC 69-262 (1969).) The issues raised there are equally relevant here, and I simply do not understand why the Commission continually refuses to deal with them.

NATIONAL B/CASTING CO., INC.)
NEW YORK, NEW YORK)

FCC 69-271
29119
March 20, 1969

[¶10:315] Cigarette advertising

Licensee which broadcast a great number of cigarette commercials during the period 7:30 to 11:00 p.m., over a period of 14 days, and broadcast anti-smoking messages on only five of the 14 days within the same time period, was required to make a greater effort to inform listeners of the health hazards. National B/casting Co., Inc., 15 RR 2d 1065 [1969]

This refers to a Petition to Revoke the License of Station WNBC-TV filed on June 12, 1968, by John F. Banzhaf, III and ASH, Action on Smoking and Health, alleging a failure to comply with the requirements of the Commission's cigarette advertising policy, set forth in Applicability of the Fairness Doctrine to Cigarette Advertising, 9 FCC 2d 921 (1967) [11 RR 2d 1901], affirmed, John Banzhaf, III v. FCC, Case No. 21285, C.A.D.C., November 21, 1968 [14 RR 2d 2061], petition for rehearing pending.

The above policy requires that a broadcast licensee presenting cigarette commercials, which convey ". . . any number of reasons why it appears desirable to smoke . . ." – must ". . . devote a significant amount of time to informing the listeners of the other side of the matter – that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user." (9 FCC 2d at 939). At the same time, we stressed that we would implement the requirement in such a way as not to drive cigarette commercials off the air – a result which would be inconsistent with the Congressional direction in the Cigarette Labeling and Advertising Act.

We have reviewed the facts of the case and find a disparity between the number of cigarette commercials and the efforts to inform the public on the other side of the matter (i.e., here the anti-smoking messages). However, when your total performance in the test weeks is considered, we cannot say that the disparity is so great, taking into account the above policies, as to require a conclusion that your overall performance has been deficient.

We do note, however, that in the sample weeks, April 1-7 and 15-21, 1968, there appears to have been a concentration of anti-smoking messages outside of the hours of maximum viewing, in contrast to cigarette commercials, which were heavily represented in these periods.*/ Thus, according to the

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*/ There are, of course, various methods of measuring the television audience. To give but one example, the National Nielsen Television Index for the two weeks ending November 24, 1968, depicts percentages of sets-in-use as follows:

[Footnote continued on following page]

information you have supplied, although a great number of cigarette commercials were broadcast during the period 7:30-11:00 p.m., anti-smoking messages were broadcast within this period on only five of the fourteen days.

We recognize that, in view of the considerations set forth in the last sentence of the second paragraph above, parity between cigarette commercials and anti-smoking messages cannot be required during these hours, and that the implementation of our policy requires a sensitive balancing. Without setting down any mathematical formula and recognizing that you have made substantial efforts to meet your obligations in this respect, we believe that greater effort is called for during the period of maximum viewing. We therefore request that within sixty days of the date of this letter you submit a statement of your future policies in this area and that, after the passage of a period of four months from the issuance of this letter, you submit a report of your efforts to implement such policies.

This letter was adopted by the Commission on March 19, 1969. Commissioner Cox concurred in the adoption of the letter but would, in addition, have indicated that the licensee should have maintained approximately the same ratio between cigarette commercials and anti-smoking messages in all periods of the broadcast day. Commissioner Johnson dissents with statement. Commissioner Wadsworth dissented.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

John Banzhaf and a group called Action on Smoking and Health (ASH) have sought to persuade this Commission that its ruling regarding cigarette advertising and the Fairness Doctrine ought to be enforced. Unfortunately the majority feels otherwise.

WNBC-TV, NBC's flagship station in New York City, is told by the majority:

> "We have reviewed the facts of the case and find a disparity between the number of cigarette commercials and the efforts to inform the public on the other side of the matter (i.e., here the anti-smoking messages). However, when your total performance in the test week is considered, we cannot say that the disparity is so great, taking into account the above policies, as to require a conclusion that your overall performance has been deficient.

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*/ [Footnote continued from preceding page]

Time (p.m.)	Percentage	Time (p.m.)	Percentage
4 - 5	32.9	8 - 9	65.3
5 - 6	41.8	9 - 10	63.5
6 - 7	52.6	10 - 11	54.6
7 - 8	60.3	11 - 12	34.5

We do not set forth these figures as necessarily representative for any particular city or for all times of the year, nor need we develop this matter further. It is sufficient to note that hours such as 7:30 to 11 usually encompass greater viewing.

> "We do note, however, that in the sample weeks, April 1-7 and 15-21, 1968 there appears to have been a concentration of anti-smoking messages outside of the hours of maximum viewing, in contrast to cigarette commercials, which were heavily represented in these periods. Thus, according to the information you have supplied, although a great number of cigarette commercials were broadcast during the period 7:30-11:00 p.m., anti-smoking messages were broadcast within this period on only five of the fourteen days.
>
> "We recognize that . . . parity between cigarette commercials and anti-smoking messages cannot be required during these hours, and that the implementation of our policy requires a sensitive balancing. Without setting down any mathematical formula and recognizing that you have made substantial efforts to meet your obligations in this respect, we believe that greater effort is called for during the period of maximum viewing. . . . "

A survey conducted by the Commission analyzing only two weeks of WNBC programming in prime time showed that the ratio of cigarette announcements to anti-smoking announcements was 8.1 to 1, and that the length of announcements was 5.6 to 1. This substantial disparity is alone sufficient to warrant a Commission inquiry into the issues involved. Yet, as shall become clear below, these ratios must be substantially increased to reflect the true ineffectiveness of WNBC-TV's presentation of anti-smoking announcements. The Commission does not need to deal with "mathematical formulas" to conclude that its ruling under the Fairness Doctrine has been flagrantly violated. 1/ How unconcerned can we be when licensees ignore our rulings?

The contrast between the way the Commission deals with small stations and large corporate licensees is striking. A small, family-owned AM radio station that operates with the wrong power for a few days, or comes on the air before sun-up, may be levied a substantial fine by this Commission. Time brokerage, false logging, or an abuse of advertisers – such as double billing – may actually result in license revocation. See, e.g., Continental Broadcasting, Inc., 15 FCC 2d 120 [14 RR 2d 813] (1968). But a network licensee that ignores a Commission ruling on the life and death issues surrounding a controversy of such importance that the Commission has now proposed to outlaw all cigarette advertisements entirely [Cigarette Advertising, FCC 69-95 (1969)], is merely sent an apologetic letter politely requesting the network to do better if it possibly can. (It should also be noted that petitioners' complaint was filed over nine months ago, dealing with programming almost a year old. We are not told whether NBC has continued its pattern of non-compliance during this period – a prime example of the Commission's vaunted "expeditious resolution.")

The issue here involved, therefore, is whether WNBC has failed to comply with a Commission ruling by not devoting "significant" time to anti-cigarette

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1/ It goes without saying that the instant case is not the only potential violation which has been reported to the Commission in recent months. This case is not an isolated incident but may be reflective of widespread industry practice.

announcements – that is, whether the impact of such anti-cigarette announcements is so disproportionately small as to fail to counteract to any "significant" degree the station's current barrage of pro-cigarette commercials. The resolution of this issue depends on the standards adopted to gauge the "significance" of anti-smoking announcements in combating the persuasive charm of pro-cigarette commercials.

The majority has acknowledged a "disparity" between the number of cigarette commercials and anti-smoking announcements, and has even recognized that substantial periods of prime evening time are completely devoid of any such announcements. Nevertheless, it inexplicably asserts that this disparity is not "so great . . . as to require a conclusion that your overall performance has been deficient." The majority's failing is its almost exclusive concentration on the number, rather than the impact, of the pro-cigarette commercials. This exclusive emphasis is unfortunate for several reasons.

First, the majority has not adequately considered the fact that WNBC-TV has concentrated its pro-cigarette commercials during those prime evening time periods which attract the largest audiences. WNBC-TV only broadcast anti-smoking announcements in prime time on 5 of the 14 days studied, and on 4 of these days only one anti-smoking announcement was broadcast during the heavy revenue producing prime time periods. This inevitably means that millions of New York City viewers did not see any anti-smoking announcements. For them, ratios are irrelevant: they will still see nothing but pro-cigarette commercials. At the very least, therefore, a substantially greater number of anti-smoking announcements appear to be required during prime time hours before a comparison of ratios becomes meaningful at all. In addition, the majority makes no attempt to estimate the true impact of pro-cigarette commercials and anti-smoking announcements during prime time hours. A more relevant criterion of "significance" might be the toal number of persons viewing each such spot – the number of "exposures" – each evening. Yet the majority fails to cast its analysis in these terms just a few short months after the Commission used such an approach to propose a total ban on all cigarette advertising from radio and television. [Cigarette Advertisements, FCC 69-95 (1969)]. At that time, we stated there was "no question but that cigarette commercials have significant impact" (emphasis added) on their audience, and supported our conclusion by measuring the number of "exposures" of cigarette commercials to viewers – "(i.e., the number of cigarette commercials times the estimated program audience) resulting in 13.3 billion exposures in January, 1968 alone." (Id. at para. 7.) If this audience "exposure" calculation was deemed persuasive enough to justify a complete ban on cigarette advertising from radio and television, one would think that a similar calculation would contribute toward consideration of the need for a hearing to determine whether WNBC-TV's performance on these fairness and other issues justifies renewal of its license. Surely it is no accident that the cigarette industry is expending millions of dollars a week for prime time advertising space. It would ignore the obvious to contend that late evening or early morning or afternoon advertisements are as effective as prime time commercials.

Second, it is clear that prime time audiences [illegible] of young, pre-smoking teenagers – [illegible] the age group [illegible] susceptible to the projected charm, adventure and romance of the cigarette style of life. This age group is less well represented in the audiences for the late-late shows, and is in school during morning and afternoon programs. It would not be

surprising if members of this impressionable age group in New York City could easily have gone for weeks without viewing one anti-cigarette announcement on WNBC-TV.

Again, in this Commission's proposed rulemaking on Cigarette Advertisements [FCC 69-95 (1969)], we noted that cigarette "commercials reach children to a very significant extent," and estimated that 23 percent of all cigarette commercial exposures reach children and teenagers between the ages of two and 17. (Id. at para. 7.) If the impact of cigarette advertisements on children is substantial enough to support a complete ban on such advertisements from radio and television, it is difficult to imagine why the Commission now refuses even to consider this type of calculation.

Finally, the ratio of 8.1 pro-cigarette commercials to 1.0 anti-smoking announcements on WNBC disclosed by the Commission's survey does not include "billboard" announcements. Thus, the already large disparities between the number of pro-cigarette commercials and anti-smoking announcements must be increased further by the addition of such "billboard" announcements as the following, broadcast over WNBC:

> "The High Chaparral, brought to you by . . . Raleigh, the filter cigarette with real tobacco taste, valuable coupons too . . . ."

I am simply unwilling to accept the assumption of the majority that such "billboard" sales techniques are without impact and can therefore be excluded from consideration. According to respondent's supplementary response, inclusion of pro-cigarette "billboard" announcements broadcast over WNBC in the list of pro-cigarette commercials on that station would increase their number by more than 20 percent. (Supplement to Response of NBC, at p. 3.) 2/

It is clear, therefore, that the majority's analysis of the ratio of pro-cigarette commercials to anti-smoking announcements conceals more than it reveals. The inclusion of "billboard" announcements would increase this ratio from 8.1 to 1.0, to approximately 10.0 to 1.0, and if it is assumed that most school-age children and teenagers watch television during prime time hours when pro-cigarette commercials are at their heaviest, and few watch when the anti-smoking announcements are aired (while they are in school or asleep), it becomes clear that the "impact" ratio of pro-cigarette commercials to anti-smoking announcements on an important and susceptible segment of our population should provide greater cause for Commission concern.

It would appear, therefore, that pro-cigarette commercials in fact reach a far greater and more impressionable audience than the majority's reasoning might suggest. Yet the majority has made no real attempt to enunciate any meaningful formula by which the true impact of cigarette commercials and announcements, both pro and con, can be assessed. In actual fact, the majority's response appears to be more of an instinctive "gut-reaction" than an

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2/ This list of factors the majority has not considered is not exhaustive. The length of pro-cigarette commercials and anti-smoking commercials is often particularly revealing. In one case reported to the Commission, the number of pro-cigarette to anti-smoking spots was 7.7 to 1, yet the ratio of length was 21 to 1 in prime time.

attempt clearly to articulate a standard or judgment by which we may give the industry guidance in the future.

I do not have the slightest idea how the majority arrived at, or can justify, its apparently unsupported conclusion that WNBC-TV's performance has not been "deficient." If the majority is in fact going to establish a working standard of "significance" for anti-smoking announcements, then I would suggest there are many important factors to consider. I have attempted partially to list some of these factors above. It does not become the Commission to justify its opinions by snatching speculative and unsupported judgments out of the blue when its decisions are apparently reached on conjectural or unarticulated grounds. For these reasons, the Commission should at least attempt to articulate the standards by which it is guided, and not merely dismiss petitioners' complaint with the flat assertion that no action is warranted.

Nor is the majority's handling of the procedural matters in this case any more satisfactory. Banzhaf and ASH have sought revocation of the WNBC-TV license. That relief is denied, although the majority agrees that NBC has not fully fulfilled its fairness obligations.

But Mr. Banzhaf and ASH did not limit their allegations to WNBC's performance under the cigarette fairness decision. They state:

> "It is the position of the petitioners that the deliberate and willful violation of both the letter and spirit of the Commission's ruling in this area so vital to the health and very lives of millions of its viewers is more than sufficient grounds for revoking the license of WNBC-TV and that the Commission need not and should not consider its entire broadcast record. Petitioners therefore respectfully request that a hearing on these matters and only these matters be set for the earliest possible date, bearing in mind that any decision of the Commission is bound to be appealed to the courts and thus delaying a final resolution in this area. However, if the Commission should rule that the entire broadcast record of WNBC-TV must be considered, then the petitioners respectfully reserve the right to amend and supplement this petition to provide additional information and respectfully allege the following additional areas in which the Licensee-Respondent fails to serve the public interest:
>
> 1. Excessive number of commercials, often presented so as to disrupt and detract from the principal programming.
>
> 2. Misleading and deceptive programming practices.
>
> 3. Failure to present programming responsive to the needs of racial minority groups and to feature members of such groups in the regular and commercial programming.
>
> 4. Incomplete, deceptive, and misleading responses on official forms in connection with licenses renewal.
>
> 5. Failure to present programming critically exploring areas of public importance and concern where the interests of advertisers and potential advertisers might be adversely affected.

6. Insufficient and in fact almost nonexistent programming of a cultural and intellectual nature.

7. Excessive violence, crime, sadism, etc., especially in programs presented for, and viewed by, young children.

8. Contributing towards the monopolization of the communications media.

9. Failure to provide programming responsive to the educational, social, and cultural needs of its very large pre-adult audience.

10. Excessive use of reruns and old movies, thus depriving viewers of fresh programming.

11. Failure to fulfill its obligations under the Fairness Doctrine with respect to other controversial issues of public importance.

12. Failure to provide programming responsive to the special needs and desires of substantial minority groups and interests within its viewing audience.

13. Unimaginative, uninteresting, and unentertaining programming.

14. Lack of participation by representatives from the community in its program planning and failure to respond to the wishes of its viewers."

And what do we say to the fourteen points? The majority responds:

"While any additional information filed by petitioners to supplement their petition may raise significant questions, their examination and resolution are more appropriate to a consideration of licensee's renewal application, which necessarily will involve a review of station activities during the entire license term, including actions of the licensee to discharge its obligations under the fairness doctrine."

This is a peculiar ruling.

Surely the majority remembers that over the last nine months it has taken the following investigatory actions with regard to NBC:

(1) On May 1, 1968 the Commission wrote NBC concerning "allegations that your broadcasts of the Hollywood Golden Globe Awards have contained substantial misrepresentations." The Commission, after investigation, concluded:

"[W]e believe that your Golden Globe Award broadcasts prior to 1968 substantially misled the public as to the basis on which winners were chosen and the procedures followed in choosing them, and that you were seriously delinquent in this respect . . . .

. . . . .

"We believe that you have fallen far below the degree of responsibility which is expected of a licensee with respect to the matters set forth herein, and we request that you submit a statement as to future procedures to be followed with respect to this program and other programs raising comparable problems. This matter will be considered further in connection with the next application for renewal of license of your Los Angeles television station, KNBC."

FCC 68-491 (1968).

(2) On October 9, 1968 the Commission wrote NBC concerning procedures on two of its quiz-game shows - PDQ and Hollywood Squares. The Commission concluded:

"[T]he public has from time to time been misled as to the procedures preceding the questioning of guest celebrities on Hollywood Squares, and that your own procedures for prevention of improper practices on these programs has been lax.

. . . . .

"The matters set forth above will be considered further in connection with the pending application for renewal of license of Station KNBC."

FCC 68-1025 (1968).

(3) The Commission has received numerous Fairness Doctrine complaints regarding NBC's coverage of the 1968 Democratic National Convention. That matter has not yet been resolved by the Commission.

(4) One of the charges against NBC in connection with its coverage of the Democratic Convention is the allegation that NBC employees placed a hidden microphone in a room that was subsequently used for closed platform committee meetings.

(5) On September 11, 1968 the Commission wrote NBC concerning possible conflicts of interest involving one of its commentators, Chet Huntley, and his comments about the Wholesome Meat Act. The Commission noted:

"[W]e find that NBC did not exercise reasonable diligence in light of information publicly available and information brought to its attention . . . .

. . . . .

"The above record over the period stretching from 1964 to the present shows a failure to exercise reasonable diligence or to fulfill public interest requirements in this important area.

. . . . .

"Thus, you appear to have fallen short of your responsibilities with respect to the matters set forth with regard to the Fairness Doctrine."

FCC 68-931 (1968).

(6) On September 17, 1968 the Commission wrote NBC concerning a "Lucky Bucks" contest presented over NBC station WKYC in Cleveland, Ohio. The Commission concluded:

"In the Eastern Broadcasting Corporation letter the Commission noted that advertising deception may result from the use of statements which are not technically false or which may even be literally true, since the only relevant consideration is the impact of the statements on the general public, including the ignorant, the unthinking, and the credulous. Applying this proposition to the instant case, the Commission is of the view that the advertisements pertaining to the WKYC 'Million Dollar' contest tended to mislead the public in that they contained extravagant claims concerning the amount of money to be given away.

. . . . .

"In view of all the circumstances of this matter, the Commission is of the opinion that the advertising pertaining to the WKYC 'Million Dollar' contest fell short of the required degree of licensee responsibility. This matter will be considered further in connection with the next applications for renewal of license of Stations WKYC-AM-FM."

FCC 68-957 (1968). (The majority referred to the Eastern Broadcasting Corporation case, FCC 68-768 (1968). In that case Eastern Broadcasting's license renewal was limited to a one year period for station WCVS, Springfield, Illinois, because of a "Lucky Bucks" contest. The Commission learned of the NBC-WKYC contest only because part of Eastern's defense was that it simply duplicated a contest being run by the Cleveland, Ohio NBC radio stations.)

(7) In March 1968 the Commission considered reports in a Los Angeles newspaper that a KNBC-TV crew had brought "dove" and "hawk" picket signs for use in filming a student debate at Claremont College (in the Los Angeles area). 3/ NBC responded that the signs had been prepared "to depict 'sloganeering' as opposed to the type of mature debate shown on the program, or merely as colorful

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3/ The slogans were "Victory in Viet Nam," "No Retreat," "Stop Communism," "End the Bombing," "Down with the Draft" and "Bring Them Home." The Los Angeles Times reported that the students complained that the signs would misrepresent student feeling on the issue and began to picket the NBC cameramen with their own signs that read "Hearst is alive and working at NBC." It also reported that the start of the debate was delayed while students heckled the NBC crew and that both speakers in the debate criticized the TV men for bringing the signs.

additions to the set." The Commission disposed of this matter without further action in a Minute entry for March 20, 1968, with Commissioner Cox issuing a concurring statement joined in by Commissioners Wadsworth and Johnson.

At some point this conduct by RCA-NBC, the ultimate responsible licensee, must be evaluated, whether in a renewal proceeding or a revocation action. The majority suggests in footnote 3, however, that a petition to revoke is somehow procedurally inappropriate and that the matters raised in the petition must be treated at the end of a three year license period. The majority is simply wrong. The Communications Act provides:

> "The Commission may revoke any station license or construction permit because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application."

47 USC §312(a)(2) (1964). How else is the Commission, given its disinclination actively to oversee its licensees, to learn of changed "conditions" except from petitions to revoke? And the Act further provides that:

> "The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked."

USC §309(b) (1964). This Commission's rules also provide for calling up the renewal of a license prior to its expiration date if it is "essential to the proper conduct of a hearing or investigation." 47 CFR §1.539(c) (1968).

In sum, the petition to revoke WNBC's license is timely, appropriate and sanctioned by Commission rules. The issues raised by petitioners fully warrant a hearing into the licensee's qualifications to continue its operation of WNBC in the public interest.

The majority's refusal to initiate a hearing into the licensee's qualifications is unjustified in practical fact as well as legal theory. It so happens that WNBC's petition for renewal of its license, due on March 1, 1969, has already been filed. And the majority itself states that the "significant questions" which may have been raised by petitioners "are more appropriate to a consideration of licensee's renewal application, which necessarily will involve a review of . . . actions of the licensee to discharge its obligations under the fairness doctrine." According to the majority's own reasoning, therefore, the proper time for consideration of these issues is now at hand. The Commission should order a hearing to determine whether WNBC's license ought to be revoked on the grounds raised by petitioners and others, and then consolidate this hearing with a general inquiry into WNBC's qualifications for a three-year license renewal.

The majority does a disservice to the agency by suggesting that its powers somehow do not encompass the facts of this case. The problem is not weak legislative authority but a weak will to act. I dissent.

RETAIL STORE EMPLOYEES UNION, LOCAL 880, RETAIL CLERKS INTERNATIONAL ASSN., AFL-CIO v. FEDERAL COMMUNICATIONS COMMISSION

U. S. Court of Appeals, District of Columbia Circuit, October 27, 1970

No. 22,605

[¶10:309(I)(1)] Necessity for hearing on petition to deny renewal application.

Renewal, without hearing, of the license of a station was not properly supported by the record, where a labor union, seeking a hearing on a petition to deny, alleged that improper pressure had been exerted on the station to cause it to cancel union advertising regarding a strike at a department store in the licensee's community; no station in the community would carry the advertisements; the station broadcast more than a thousand spot announcements for the store in the nine months following cancellation of the union advertisements; and responses of the station as to why it cancelled the advertising were not satisfactory. Retail Store Employees Union v. FCC, 20 RR 2d 2005 [US App DC, 1970].

[¶10:309(I)(1)] Effect of findings by NLRB on Commission decision.

Where, in a petition to deny renewal of license, a labor union charged that the station involved had yielded to improper economic pressure in cancelling union advertising on the station, the Commission was not justified in giving summary treatment to the charges on the ground that the charges had been investigated and rejected on factual grounds by the NLRB. When one federal agency has rejected factual charges after an adequate investigation a sister agency may be entitled to rely on the prior investigation in dismissing factually identical allegations without hearing. In such cases, however, at the very least the record must demonstrate that the previous investigation was adequate. Retail Store Employees Union v. FCC, 20 RR 2d 2005 [US App DC, 1970].

[¶10:309(I)(1), ¶51:311] Use of discovery to avoid need for full-dress evidentiary hearing.

While the Commission's discovery mechanisms are available only after a case is set for hearing, and

while Section 309 of the Act requires that any hearing on a petition to deny renewal of license must be a full hearing, cancellation of the hearing is not foreclosed if prehearing discovery resolves all relevant factual disputes. Retail Store Employees Union v. FCC, 20 RR 2d 2005 [US App DC, 1970].

[¶10:309(I)(1), ¶10:315(G)(1), ¶10:315(G)(2)] Fairness doctrine.

Where a union, in seeking denial of renewal of license, complained, inter alia, that the station involved cancelled union advertisements relating to a strike against a department store in the licensee's community, continued to carry the store's advertisements (with no mention of the strike), and offered a single roundtable broadcast to both sides, the Commission's conclusion that there was "no need to consider further issues under the fairness doctrine" was an inadequate treatment of the question. In dealing with cigarette advertising, the Commission has recognized that a position represented by an advertisement may be implicit rather than explicit. And although the Commission emphasized that its holding in that case was limited to cigarette advertising, the reasons advanced to support the limitation seem not to imply that other advertisements may not carry an implicit as well as an explicit message, but rather that the implicit and explicit messages normally carried by advertising do not concern controversial issues of public importance. It is at the very least a fair question whether a radio station properly serves the public interest by making available to an employer broadcast time to urge the public to patronize his store, while denying the employees any remotely comparable opportunity to urge the public to boycott the employer. Retail Store Employees Union v. FCC, 20 RR 2d 2005 [US App DC, 1970].

Appeal from the Federal Communications Commission [14 RR 2d 780].

Mr. Joseph E. Finley for appellant.

Mr. D. Biard MacGuineas, Counsel, Federal Communications Commission, for appellee. Messrs. Henry Geller, General Counsel, Federal Communications Commission, John H. Conlin, Associate General Counsel, and Bernard C. O'Neill, Jr., Counsel, Federal Communications Commission, were on the brief, for appellee. Mrs. Lenore G. Ehrig, Counsel, Federal Communications Commission, also entered an appearance for appellee.

Before Bazelon, Chief Judge, Robinson and Robb, Circuit Judges.

Bazelon, Chief Judge: This is an appeal, 47 USC §402(b)(6), from a memorandum opinion and order of the Federal Communications Commission renewing without hearing the broadcasting license of Radio Station WREO of Ashtabula, Ohio, over the protest of Retail Store Employees Local 880 (Union). 1/ We conclude that the Commission has failed to demonstrate adequate consideration of issues of substantial public importance, and accordingly remand the case to the Commission for further proceedings. 2/

I.

This case arises out of a labor-management dispute not involving WREO. Hill's Department Store of Ashtabula, Ohio, (Hill's-Ashtabula) is one of a chain of such stores in northeastern Ohio and southwestern Pennsylvania operated by the Shoe Corporation of America. In April 1965, appellant Union was certified by the National Labor Relations Board as the bargaining agent for employees of Hill's Ashtabula. 3/ Late in that year or early in the next 4/ after some months of bargaining, the Union determined to seek its objectives by going on strike. Hill's Ashtabula was struck, and a boycott beginning there spread to other Hill's stores in the area, including Youngstown, Warren, and Sandusky, Ohio.

During this period, Hill's regularly purchased radio air time for advertising. Although no samples of Hill's advertisements are before us, the parties are agreed that the advertising was standard commercial copy, extolling the virtues of Hill's stock, bargains, and service, and on that basis urging listeners to patronize the various Hill's outlets. Seventy such announcements were run by WREO between January 10 and February 22, 1966. Similar copy was carried by Stations WFMJ of Youngstown, WHHH of Warren, and WLEC of Sandusky. Beginning in February, 1966, the Union undertook to support its boycott by purchasing time for one-minute spot announcements stating that a strike was in progress against Hill's Ashtabula, and urging listeners to respect the picket lines at that and the other Hill's Department Stores. 5/

1/ Radio Enterprises of Ohio, Inc., 14 P & F Radio Reg 2d 780 (December 2, 1968).

2/ See parts II-IV, infra.

3/ The record does not indicate whether the Union represents employees at other Hill's outlets.

4/ The record is not clear on this point.

5/ One such announcement, agreed by the parties to be typical, ran as follows:

"Announcer. Here is an important message from Retail Store Employees Union Local 880 - regarding the picket line now at Hill's Department Store in Youngstown. The picket line is in support of the strike at Hill's

[Footnote Continued on following page]

Three hundred and twenty-two such announcements were carried by WREO between February 16 and April 7, 1966. In addition, WFMJ of Youngstown carried two such spot announcements (both on March 22), and WLEC of Sandusky carried one hundred and seventy such announcements from February 23 through March 28. 6/ WHHH of Warren, Ohio, although approached by the Union, refused to accept any of the Union's advertisements upon the advice of its counsel that "no fairness question was presented" 7/ and that the station was therefore not compelled to run the proffered advertisements.

As the spring wore on, however, the Union experienced more and more difficulty in purchasing air time for its advertisements. Despite continuing attempts by the Union, through an advertising agency, to purchase further time, by early April of 1966 it could find no station serving the area around Ashtabula willing to run its advertisements. Apparently the last of the stations to cancel was WREO of Ashtabula, which on April 5 wrote the advertising agencies representing the Union and Hill's Ashtabula to inform them that WREO "would accept no further commercial copy from either party concerning the strike between Hill's and the union." 8/ Subsequently, after counsel for the Union informed WREO that he had filed a complaint regarding this action with the FCC, the station on April 22 offered free time to both parties for a single "round table discussion" of the issues presented by the strike. 9/ This offer was never accepted by either party.

5/ [Footnote continued from preceding page]

Department Store in Ashtabula. This strike now in progress at Hill's comes after seven months of continuous negotiations, during which no agreement has been reached between the Retail Store Employees Union Local 880 - and the management of HILL'S DEPARTMENT STORE. Important issues still unresolved include Union Security Arbitration and Grievance Procedure, Health and Welfare, Funeral Leave, and Visitation Rights to the store. These, and other issues are vital to the betterment of the store employees working conditions. Some Hill's employees are still working because if they all go out - the Company would try to replace them with non-union help who could be granted a vote in subsequent elections. The 2,000 members of Retail Store Employees Union Local 880 request that all union members, their families and friends observe and respect the picket line now at HILL'S DEPARTMENT STORE."

6/ Although the record is not clear in this regard, it appears that some spot announcements were also carried by other stations in northeastern Ohio and northwestern Pennsylvania.

7/ In re Application of WFMJ Broadcasting Co., 14 FCC 2d 423, 426 [13 RR 2d 1226] (1968) (concurring and dissenting opinion of Commissioner Johnson).

8/ Letter from Radio Station WREO to counsel for the Union, April 22, 1966.

9/ Id.

Some time in April, the Union filed complaints with the FCC, charging "various Ohio and Pennsylvania radio stations" 10/ (including WREO) with violations of the fairness doctrine. The Commission, in an unreported letter of April 29, 1966, "found no controversial issue of public importance involved in the factual situation and . . . pointed out that a broadcaster is not a common carrier in the sense that he must accept advertising from all comers . . . ." 11/ About the same time, the Union formally charged Hill's with a violation of the National Labor Relations Act for exerting economic pressure against some of these radio stations to persuade them to cancel the Union's advertising. This charge was ultimately rejected by the National Labor Relations Board's Office of Appeals on March 14, 1967. 12/

In the meantime, WREO continued to broadcast advertisements for Hill's Ashtabula. One hundred and twenty-three announcements and six sponsored programs were run during the month of April, and from April 1 to the end of the year, the station broadcast 1,088 spot announcements, 176 sponsored programs, and fourteen sponsored one-third segments of football games on behalf of the store. 13/ Similarly, it appears that advertising on behalf of Hill's continued to be broadcast by WFMJ, WHHH, and WLEC. 14/ Accordingly, on August 9, 1967, the Union filed with the FCC unverified 15/ petitions to deny renewal of the licenses of Stations WFMJ, WHHH, WLEC, and WREO. The petitions alleged that the stations had succumbed to economic pressure from Hill's and therefore cancelled the Union's strike advertising; and that, in any event, refusal to carry advertising by the Union while continuing to carry advertising from Hill's urging listeners to patronize its stores was a violation of the fairness doctrine. The FCC wrote each of the

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10/ In re Application of WFMJ Broadcasting Co., supra note 7 at 424. The present record does not indicate precisely which stations were charged, and the FCC's response is apparently unpublished. See note 11 infra.

11/ In re Application of WFMJ Broadcasting Co., supra note 7 at 424. We have been unable to find any indication that this letter has been published, and it is not part of the record before us. Accordingly, we have inferred its contents so far as possible from the majority opinion in WFMJ, supra.

12/ Letter from the NLRB to Edward W. Hummers, Jr., Esq., August 17, 1967.

13/ These figures are compiled from WREO's response to an inquiry by the FCC. If, as seems likely, the response contains a typographical error, the correct figures would be 1,190 announcements, 74 programs and 14 thirds of football games.

14/ The record is not clear on this point.

15/ See 47 USC §309(d)(1) (1964). On September 12, 1968, counsel for the Union verified the petition to deny renewal of WREO's license.

affected stations inquiring, inter alia, why Union advertising had been rejected. 16/ After receiving replies to its inquiry, 17/ the Commission in a memorandum opinion and order 18/ denied the Union's petitions regarding WFMJ, WHHH, and WLEC. The Commission, apparently relying upon its letter to the Union of April 29, 1966, 19/ found no fairness question presented. With regard to the Union's charges of economic pressure, the Commission noted that similar charges had been rejected by the National Labor Relations Board after investigation; 20/ that each of the three stations had categorically denied that any such pressure had been exerted against them; and that the Union had provided no specific allegations of particular economic pressure exerted against any of the stations. 21/ Accordingly, the Commission denied the petitions and granted the stations' request for renewal. 22/ No appeal was taken from that decision.

16/ The only letter in the present record is that sent to WREO. It appears, however, that essentially identical letters were sent to the other stations. The letters also requested information regarding the number of advertisements of Hill's and the Union that were broadcast by each station.

17/ WFMJ indicated that it investigated the local import of the strike in Youngstown, the city primarily served by the station, and discontinued the advertisements only after it concluded that the issue was not of importance there. WLEC of Sandusky carried 170 union advertisements and discontinued them only after determining that Hill's Sandusky store would not be struck. WHHH, upon being informed by its counsel that no fairness question was presented, never ran any Union advertisements.

18/ In re Application of WFMJ Broadcasting Co., supra note 7.

19/ See notes 10-11 supra and accompanying text.

20/ See note 12 supra and accompanying text. The scope of the NLRB's investigation of the charges does not appear in the present record, but it does appear that the NLRB's rejection was based upon its conclusion that the allegations of economic pressure were unfounded.

21/ In re Application of WFMJ Broadcasting Co., supra note 7 at 424.

22/ The Commission's reasoning on this point is not entirely clear, for the factors relied upon by the Commission to support its rejection of the Union's petitions regarding these stations would apply equally well to WREO. As noted immediately below, however, renewal of WREO's license was deferred pending further investigation. The true reason for the distinction would seem to be that indicated in the concurring and dissenting opinion of Commissioner Johnson, who pointed out that the stations whose licenses were initially renewed had provided full explanations for their actions, see note 17 supra, while WREO had merely relied upon unspecified "reasons of policy." See In re Application of WFMJ Broadcasting Co., supra note 7 at 426-27.

Action on the Union's petition regarding WREO was deferred pending "further inquiries" by the Commission. 23/ Subsequently, the Commission wrote the Manager of Hill's Ashtabula requesting a statement regarding "your part, if any" in the controversy between the Union and WREO, and asking him to state "whether Hill's, or any of Hill's employees or agents, at any time during 1966 sought to influence WREO directly or indirectly to cancel spot announcements by Local 880 concerning the Ashtabula strike." 24/ The manager replied that no such efforts had been made by the store. 25/ In addition, the Commission requested further information from WREO regarding its "policy" decision to cancel the Union's advertising, and regarding a conversation between the station manager and Hill's advertising agency at which the agency representative had contended that "some of the ads of Local 880 were possibly illegal." 26/

Shortly thereafter, WREO replied. It categorically denied that any agent of Hill's at any time during 1966 sought to influence WREO concerning the cancellation of the Union's advertising. It explained the conversation regarding the "possibly illegal" Union advertisements as an uninfluential, isolated remark made during the course of a normal sales call. 27/ With regard to

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23/ Id. at 423 n. 1 (majority opinion).

24/ Letter to Manager, Hill's Department Store, from the FCC, August 21, 1966.

25/ The full text of the Manager's reply is as follows:

"In reply to your letter of August 21, 1966, please be advised that this store did not at any time seek to influence Radio Station WREO to cancel announcements by RCIA local #880 concerning its strike against this store."

26/ Letter to WREO from the FCC, August 21, 1966. The characterization of the conversation is from WREO's previous response to the Commission's inquiries. Commissioners Lee and Wadsworth dissented to issuance of the letter and noted that they would grant the license renewal without further argument or investigation.

The FCC, on the same date, also wrote Local 880 requesting that its petition to deny be verified and asking whether the Local had had any conversations with Hill's regarding cancellation of Union advertising. The Union's counsel replied that they had neither records nor memory of any such conversations.

27/ In full, the station's response reads:

"In our opinion, neither Hill's nor Mr. Moore [a representative of Hill's advertising agency] sought to influence WREO and we did not interpret Mr. Moore's remarks as an attempt to influence WREO. WREO did not cancel Local 880's ads because of or as a result of Mr. Moore's remarks. They were cancelled because and for the reason we gave in our answer to Question No. 2 [quoted in text immediately above]. The date of the Moore-Fassett [a representative of the station] conversation was approximately March 31, 1966. To our knowledge, Local 880 spots were not discussed at more than this conversation. The Moore-Fassett 'meeting' was a telephone conversation instituted by Mr. Fassett in the course of a normal sales call. No meeting was arranged by either party."

the station's decision to cancel the Union's advertising, the letter provided the following explanation:

> "WREO has been operating as an independently owned radio station since 1937. During these years we afforded the public a service compatible with good taste and minimal irritation. We never permitted ourselves to be influenced or coerced in the use of air time.
>
> "Our policy also has been to avoid airing private controversies since statements might be made of a possibly damaging nature to persons or businesses, and as a generality such controversies were of a private and not of a public interest.
>
> "WREO had carried about 322 of Local 880's announcements when it became apparent, from complaints of the public, that the continuous repetition of these partisan announcements had become an irritant to WREO's listening audience. The advertisements concerned a controversy in which the public and WREO were not a part of [sic].
>
> "We therefore notified both parties that we would accept no more announcements concerning the strike.
>
> "The Union then sent a letter to WREO and stated that the public had a right to have information concerning this private labor dispute.
>
> "WREO bent over backwards then to offer the union free time on the air at a WREO sponsored round table to discuss the labor dispute with Hill's, so if there was any possible public interest the matter could be heard. The union did not accept this opportunity."

This response appeared to satisfy the Commission. On December 2, 1968, it released a Memorandum Opinion and Order 28/ in which it found "no unresolved questions of fact remaining," 29/ and therefore no necessity for a hearing. It accepted Hill's and WREO's denials of improper influence, noting that the Union had come forward with no further factual material to support its allegations. As to the Fairness Doctrine aspect of the Union's claim, the Commission noted that WREO "has presented the [Union's] advertisements," and that after refusing to accept further copy on the subject it nevertheless offered free air time for a roundtable discussion. "In the circumstances,"

28/ Radio Enterprises of Ohio, Inc., P & F Radio Reg 2d 780 (December 2, 1968). Commissioners Cox and Johnson dissented, Commissioner Johnson at least presumably on the basis of his separate opinion in In re Application of WFMJ Broadcasting Co., supra note 7. Commissioner Wadsworth, who was absent, did not participate.

29/ Radio Enterprises of Ohio, Inc., supra note 28 at 782.

the Commission concluded, "there is no need to consider further issues under the fairness doctrine." 30/ From this decision the Union appeals.

II.

We have previously had occasion to point out that the Federal Communications Commission was intended by Congress to function as far more than a mere referee between conflicting parties. 31/ Regardless of the formal status of a party, or the technical merits of a particular petition, the FCC "should not close its eyes to the public interest factors" raised by material in its files. 32/ We have noted that, as a general matter, the federal regulatory agencies should construe pleadings filed before them so as to raise rather than avoid important questions. They "should not adopt procedures that foreclose full inquiry into broad public interest questions, either patent or latent." 33/

As a rule, "an administrative approval without the benefit of a hearing is to be avoided." 34/ As we said in Clarksburg Publishing Co. v. FCC, 35/

> "The statute contemplates that, in appropriate cases, the Commission's inquiry will extend beyond matters alleged in the protest in order to reach any issue which may be relevant in determining the legality of the challenged grant. [36/] Clearly, then, the

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30/ Id. at 781-82. Nevertheless, the Commission did consider the matter further, stating that "we hold that WREO's refusal to accept additional ads from Local 880 after April, 1966 was, for the reasons advanced by the Station, within the proper limits of its discretion," citing McIntire v. William Penn Broadcasting Co., 151 F2d 597 (3d Cir, 1945). Radio Enterprises of Ohio, Inc., supra note 28 at 782.

31/ See, e.g., L. B. Wilson, Inc. v. FCC, 130 US App DC 156, 397 F2d 717 [13 RR 2d 2031] (1968); Citizens TV Protest Co. v. FCC, 121 US App DC 50, 348 F2d 56 [5 RR 2d 2015] (1965); Mansfield Journal Co. v. FCC, 86 US App DC 102, 180 F2d 28 [5 RR 2074e] (1950).

32/ Southwestern Publishing Co. v. FCC, 100 US App DC 251, 254, 243 F2d 849, 852 [15 RR 2013] (1957).

33/ Midwestern Gas Transmission Co. v. FPC, 103 US App DC 360, 368, 258 F2d 660, 668 (1958).

34/ City of Portland, Oregon v. FMC, ___ US App DC ___, ___, ___ F2d ___, ___ (No. 24,812, June 12, 1970) (slip opinion at 2).

35/ 96 US App DC 211, 215, 225 F2d 511, 515 [12 RR 2024] (1955).

36/ The statute here referred to was §7 of the Act of July 16, 1952, ch. 859, 66 Stat 715, amending 47 USC §309. The statute in its present form is found in 47 USC §309(e) (1964). We have previously noted that the statement in text, "made in 1955, is not affected by the 1962 amendments to 47 USC §309." Citizens TV Protest Committee v. FCC, 121 US App DC 50, 53 n. 13, 348 F2d 56, 59 n. 13 [5 RR 2d 2015] (1965).

inquiry cannot be limited to the facts alleged in the protest where the Commission has reason to believe, either from the protest or its own files, that a full evidentiary hearing may develop other relevant information not in the possession of the protestant." 37/

We need not here decide whether the Union's allegations that improper economic pressure had been exerted upon WREO to cause it to cancel Union advertising raises an issue of "such overriding public interest that the Commission would have been bound to consider [it] on its own initiative." 38/ We are convinced, however, that on the present record something more than summary treatment of the Union's allegations was required. 39/ The Union's claim that no radio station serving Ashtabula would carry its advertisements stands undisputed. It can hardly be said that the proffered advertisements were objectionable on their face. 40/ WREO had, in fact, carried 322 such announcements without any apparent hesitation. Nothing in the record suggests that mere repetition was the basis for discontinuing the advertisements, and the station did not offer to broadcast a more limited number of spot announcements, or suggest to the Union that it change its copy more frequently than had been its practice. Moreover, in the nine months following cancellation WREO broadcast more than a thousand spot announcements for Hill's Ashtabula, an average of over one hundred per month.

Nor can we or the Commission be oblivious of the attitudes of other stations in the area. 41/ It strikes us as curious, at least, that the general attitude of enterprises whose very existence was dependent upon advertising revenues

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37/ See also 47 USC §403 (1964), which provides inter alia that "The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter."

38/ Citizens TV Protest Committee v. FCC, 121 US App DC 50, 53, 348 F2d 56, 59 [5 RR 2d 2015] (1965).

39/ In its brief in this court, the FCC has pointed out that the Union's charges were investigated, and rejected on factual grounds, by the National Labor Relations Board. The Commission's Memorandum Opinion and Order denying the Union's petition does not appear to rely upon this investigation, which is not mentioned in the opinion. We recognize, however, that when one federal agency has rejected factual charges after an adequate investigation a sister agency may be entitled to rely upon the prior investigation in dismissing factually identical allegations without hearing. In such cases, however, at the very least the record must demonstrate that the previous investigation was adequate.

40/ See the sample advertisement quoted in note 5 supra.

41/ See note 17 supra.

appears to have been that the proffered advertising would be rejected unless the public interest compelled its presentation. 42/

Certainly these circumstances may validly be considered as giving rise to a justifiable suspicion that something might have been amiss. Viewed against this background, we cannot say that the responses of Hill's Ashtabula 43/ and WREO 44/ satisfactorily disposed of the matter. Explaining its decision to cancel the Union's advertisements, WREO merely stated that it had become "apparent, from complaints of the public, that the continuous repetition of these partisan announcements had become an irritant to WREO's listening audience." 45/ The station never undertook to explain how many complaints it had received, or from whom they came; whether complaints had been received regarding other advertisements carried by the station; whether its general policy was to cancel all advertising that was the subject of some listener complaints; or whether the public's objections might have been cured by less frequent broadcasting of the announcements, or more frequent changes in the Union's copy.

In light of these ambiguities in the station's response, some further investigation was certainly necessary. It may well be that, with proper use of the discovery mechanisms available in such matters, 46/ an adequate record can be made without the necessity for a full-dress evidentiary hearing. 47/ We hold only that, on the present record, the undisputed facts raise questions adequately answered neither by the station's explanations nor by the Commission's opinion. 48/ In these circumstances, we cannot say that the renewal of WREO's license is properly supported by the record.

42/ Although WREO ultimately explained its decision as resulting from listener complaints, no hint of this basis appears in its letter of April 22, 1966, to counsel for the Union. In this letter the only basis stated for the decision is that "The station management felt as a matter of policy we would have no further part in the controversy . . . ." Explanations of the other stations' position appear in note 17 supra.

43/ See note 25 supra.

44/ See note 27 supra and accompanying text.

45/ The explanation is quoted in full on page 2012 supra.

46/ See 47 CFR §§1.311-1.325 (1970).

47/ It appears that the discovery mechanisms referred to in note 46 supra are available only once a case is set for hearing. See 47 CFR §1.311 (1970). The statute, of course, requires that any hearing on a petition to deny renewal "shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate." 47 USC §309(e) (1964). It does not, however, appear to foreclose cancellation of the hearing if prehearing discovery resolves all relevant factual disputes.

48/ In this regard we would emphasize that, even assuming that Hill's Ashtabula made neither direct nor indirect suggestions that Union advertising be cancelled, there remains the question whether WREO's action was nevertheless motivated by a desire to gratify the unspoken wish of what appears to have been a major advertising client. A favor need not be solicited to be improper.

III.

We are likewise concerned by the Commission's summary treatment of the fairness question.49/ Since the case is to be remanded in any event, there is no need for a full discussion of the question here. But in light of the inadequacy of the Commission's opinion on this point, we believe it wise to provide a brief indication of some of the issues the Commission should face in this regard upon remand. 50/

A. Since its inception, federal regulation of radio and television broadcasting has been premised in large part upon the assumption that physical factors unique to this means of communication make both appropriate and necessary special means of regulation that will take into account the particular characteristics of the medium. The limited number of channels available for broadcast, and the possibility of interference among neighboring stations, of necessity required restrictions upon persons seeking to make use of the airwaves.

These restrictions could, perhaps, have been limited to technical matters: allocation of broadcast frequencies, transmitter power, and the like. This, however, has not been the case. Instead, the Commission has interpreted its statutory mandate to insure that broadcasting serves the "public interest, convenience, and necessity" 51/ as authority for at least limited regulation

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49/ The Commission found that, since WREO had presented some of the Union's advertisements, had refused to accept copy regarding the strike from either party, and had offered free time for a roundtable discussion of the issues, there was "no need to consider further issues under the fairness doctrine." No authority was cited for this statement; cf. The Evening News Association, 6 P & F Radio Reg 283 (April 21, 1950). Nevertheless, the Commission further held that "WREO's refusal to accept additional ads from Local 880 . . . was, for the reasons advanced by the Station, within the proper limits of its discretion," citing McIntire v. William Penn Broadcasting Co., 151 F2d 597 (3d Cir 1945). Since McIntire merely held, that regulation of program content was within the province of the Commission rather than the district courts, the citation can hardly be regarded as illuminating.

50/ With commendable candor, the Union on this appeal has stated its belief that, even if a violation of the fairness doctrine has occurred, this single violation in the circumstances of this case would not warrant denial of WREO's application for renewal of its license. Should the Commission agree, and should it find upon proper investigation that WREO's cancellation of Union advertising was otherwise not improper, it might wish to consider the advisability of separating the question of WREO's compliance with the fairness doctrine from the license renewal proceedings. See 47 USC §312(b) (1964); 5 USC §554(e) (Supp. V, 1970).

51/ See, e.g., 47 USC §309(a), (d) (1964).

of the content of broadcast material. 52/ The bulk of this regulation has been subsumed under the Commission's "fairness doctrine." Simply stated, the doctrine requires each broadcaster to afford "reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance." 53/

As the doctrine has developed, its central purpose has become increasingly clear. That purpose has been to insure both that the listening public is presented with information regarding controversial issues of public importance, 54/ and that facts, analysis, and argument supporting all reasonable positions on a given issue are aired by the broadcasters. 55/ That is, central to the fairness doctrine is the promotion of informed decision-making by the public by insuring that the facts and arguments relevant to decision are made available to the listening audience.

If this were the whole of the doctrine, it might well be that no substantial question would be raised by WREO's denial of air time to the Union for its advertisements. More than three hundred spot announcements had been broadcast by the station in less than two months. Taking the sample before us 56/ as typical, the advertisements merely stated that a strike was in progress, listed the issues in dispute but without giving any indication of the positions of the opposing parties, and urged without giving any reasons that listeners support the Union by boycotting Hill's Department Stores. It is difficult to see how repetition of this or similar copy would add to public knowledge, except perhaps that each repetition of the advertisement would inform the public that the strike was still in progress – information that we may well assume was sufficiently presented by regular broadcasts of local news.

52/ For a critique of this result, see Blake, Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes, 23 FEDERAL COMMUNICATIONS BAR JOURNAL 75 (1969).

53/ Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, ___ Fed Reg ___, ___, 2 P & F Radio Reg 2d 1901, 1904 (1964).

54/ See, e.g., Letter to WSOC Broadcasting Co., 17 P & F Radio Reg 548, 550 (July 16, 1958) (fairness doctrine applies regardless of coverage of issue by other media); Letter to Cullman Broadcasting Co., 25 P & F Radio Reg 895 (September 18, 1963).

55/ John J. Dempsey, 6 P & F Radio Reg 615 (1950) ("broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues . . . over and beyond their obligation to make available on demand opportunities for the expression of opposing views.")

56/ Note 5 supra.

But the Supreme Court, 57/ this court, 58/ and the Commission itself have all recognized that the fairness doctrine is not an island whole unto itself. It is merely one aspect of the Commission's implementation of the requirement that broadcast stations serve the public "interest, convenience, and necessity." Accordingly, although as a general matter equal time is not required so long as a reasonable opportunity is afforded for the presentation of opposing viewpoints, 59/ the Commission has upon occasion recognized that time, rather than information, is of the essence. Thus, in regard to broadcast spot announcements soliciting campaign contributions, the Commission has recognized that at least with regard to two major party candidates, "fairness would obviously require that these two be treated roughly the same with respect to the announcements." 60/ Presumably, the additional information presented to the public by repeated announcements would be minimal; the value of repetition would be solely in the additional coverage obtained. 61/ Similarly, in Times-Mirror; 62/ a station had aired more than 20 broadcasts by commentators favoring one major-party candidate for governor, and 2 broadcasts by commentators favoring his opponent. Summarizing its ruling, the Commission stated that "[t]he continuous, repetitive opportunity afforded for the expression of the commentators' viewpoints on the gubernatorial compaign, in contrast to the minimal opportunity afforded to opposing viewpoints, violated the right of the public to a fair presentation of views." 63/ Most recently, in the Commission's landmark ruling on cigarette advertising, 64/ the Commission stated:

> "We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our

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57/ Red Lion Broadcasting Co. v. FCC, 395 US 367, 379-80 [16 RR 2d 2029] (1969).

58/ Banzhaf v. FCC, 132 US App DC 14, 23-28, 405 F2d 1082, 1091-96 [14 RR 2d 2061] (1968), cert denied, 396 US 842 (1969).

59/ E. g., Honorable Charles L. Murphy, 23 P & F Radio Reg 953 (1962).

60/ Letter to Lawrence M. C. Smith, 25 P & F Radio Reg 291 (April 18, 1963).

61/ That is, since not all of a station's audience is normally listening to broadcasts at any one time, repetition increases the likelihood that a given message will be heard by any individual, and may also increase its impact on those hearing the message more times than one.

62/ 24 P & F Radio Reg 404 (1962).

63/ Fairness Primer, supra note 53 at ___, 2 P & F Radio Reg 2d at 1917-18.

64/ Letter to Television Station WCBS-TV, 8 FCC 2d 381 [9 RR 2d 1423], petitions for reconsideration, etc., denied, 9 FCC 2d 921 [11 RR 2d 1961 (1967), aff'd sub nom Banzhaf v. FCC, supra note 58.

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> administration of the Fairness Doctrine . . . . For, while the Fairness Doctrine does not contemplate 'equal time', if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue." 65/

In the present case, it seems clear to us that the strike and the Union boycott were controversial issues of substantial public importance within Ashtabula, the locality primarily served by WREO. The ultimate issue with regard to the boycott was simple: whether or not the public should patronize Hill's Ashtabula. From April through December, Hill's broadcast over WREO more than a thousand spot announcements and more than a hundred sponsored programs explaining why, in its opinion, the public should patronize its store. During that same period, the Union was denied any opportunity beyond a single roundtable broadcast to explain why, in its opinion, the public should not patronize the store. We need not now decide whether, as the Union would have us hold, these facts make out a per se claim of a violation of the fairness doctrine. We do believe, however, that the question deserves fuller analysis than the Commission has seen fit to give it.

B. Central to the Union's argument on this point is the proposition that, in urging listeners to patronize Hill's Ashtabula Department Store, Hill's advertisements presented one side of a controversial issue of public importance. Hill's copy, of course, made no mention of the strike or boycott, or of the unresolved issues between the Union and the store. But the advertisements did urge the listening public to take one of the two competing sides on the boycott question – they urged the public to patronize the store, i.e., not to boycott it. It seems to us an inadequate answer to this argument merely to point out that Hill's copy made no specific mention of the boycott. In dealing with cigarette advertising, the Commission has recognized that a position represented by an advertisement may be implicit rather than explicit. 66/ And although the Commission repeatedly emphasized that its holding in that case – that stations broadcasting cigarette advertisements must regularly provide free time if necessary for the presentation of arguments opposing cigarette smoking – was limited to cigarette advertising, the reasons advanced by the Commission to support that limitation seem to us not to imply that other advertisements may not carry an implicit as well as an explicit message, but rather that the implicit and explicit messages normally carried by advertising do not concern controversial issues of public importance. 67/

65/ 9 FCC 2d at 941.

66/ Television Station WCBS-TV, 9 FCC 2d 921, 938-39 [11 RR 2d 1901] (1967).

67/ Petitioners further assert that the ruling cannot logically be limited to cigarette advertising alone, and hence will have broadscale effect on broadcast operations and the presentation of advertising by radio generally . . . .

[Footnote continued on following page]

C. The Commission's ruling with regard to cigarette advertising relied heavily upon the judgment of other branches of government that, in light of the possible dangers of smoking "to the health of millions of persons," 68/ the question whether or not to smoke cigarettes was one of substantial importance to the public. 69/ In its regulation of labor-management relations, Congress has indicated substantial concern with equalizing the bargaining power of employees and their employers. 70/ Stripped to its essentials, this dispute is one facet of the economic warfare that is a recognized part of labor-management relations: the Union, in urging a boycott of Hill's Department Stores, was seeking to put economic pressure upon management to accede to its demands; management, on the other hand, was seeking to resist the Union's pressure by continuing profitable operations. Part of the Union's campaign was publicity for its boycott; part of management's arsenal was advertising to persuade the public to patronize its stores.

If viewed in this light, it could well be argued that the traditional purposes of the fairness doctrine are not substantially served by presentation of advertisements intended less to inform than to serve merely as a weapon in a labor-management dispute. But the fairness doctrine, as we have pointed out, is only one aspect of the FCC's implementation of the statutory requirement that broadcast stations operate to serve the public interest. 71/ The public policy of the United States has been declared by Congress as favoring the equalization of economic bargaining power between workers and their employers. 72/ It is at the very least a fair question whether a radio

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67/ [Footnote continued from preceding page]

"[But the] products to which petitioners refer do not present a . . . situation [comparable to cigarette advertising]. The example most uniformly cited is auto safety. But the governmental and private reports on this matter do not urge the public to refrain from normal use of automobiles in the interest of public safety; rather, the emphasis is on increased safety features . . . and increased care by drivers."

Television Station WCBS-TV, 9 FCC 2d 921, 942-43 [11 RR 2d 1901] (1967).

68/ Id. at 943

69/ See Banzhaf v. FCC, 132 US App DC 14, 28-31, 405 F2d 1082, 1096-99 [14 RR 2d 2061] (1968).

70/ See HR Rep No. 669, 72nd Cong., 1st sess (1931); 29 USC §§102, 151 (1964).

71/ See notes 57-58 supra and accompanying text.

72/ "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers. . . substantially burdens and affects the flow of commerce . . . ." 29 USC §151 (1964). See id. §§102, 159.

station properly serves the public interest by making available to an employer broadcast time for the purpose of urging the public to patronize his store, while denying the employees any remotely comparable opportunity to urge the public to join their side of the strife and boycott the employer. If the Union's claim is to be rejected, we believe this question should be dealt with by the Commission.

IV.

In summary, we believe that the Union's evidence of denial of access to radio air time raised questions regarding possible improper influence by Hill's that were not adequately answered by Hill's bare denial and the station's letter of denial and explanation. With regard to the Union's fairness question, we recognize the primary responsibility of the FCC in assuring that radio broadcasters operate their stations in the public interest. We have not here attempted a full canvass of the issues raised by even a good-faith denial to the Union of access to broadcast time; we have merely sought to indicate some of the questions that must be answered. We do believe, however, that these issues deserve far more comprehensive treatment than was afforded them by the FCC. Accordingly, we remand the case to the Commission for further proceed ngs consistent with this opinion.

So ordered.

Robb, Circuit Judge, dissenting: The case before the Commission began August 7, 1967 when the Union filed a petition to deny the renewal of the license of Station WREO. So far as material here the ground of the petition was that the station had violated the Commission's Fairness Doctrine. It was alleged that: After a long campaign the Union organized the retail store employees of Hill's Department Store in Ashtabula, Ohio, and in April 1965 the Union was certified as the collective bargaining agent for the employees. After some ten months of unsuccessful bargaining the Union placed pickets in front of Hill's store and undertook to present its case by means of newspaper and radio advertisements. Commercial time was purchased from Station WREO and from stations located in other communities where Hill's operated stores. The radio message explained that a strike was in progress, that certain issues were unresolved and that Hill's Department Store was being picketed. In conclusion the message urged that all union members, their families and friends observe and respect the picket line. 1/

1/ The full text of the Union's message was as follows:

"ANNCR: Here is an important message from RETAIL STORE EMPLOYEES UNION LOCAL 880 – regarding the picket line now at HILL'S DEPARTMENT STORE in Youngstown. The picket line is in support of the strike at HILL'S DEPARTMENT STORE in Ashtabula. This strike now in progress at HILL'S comes after seven months of continuous negotiations, during which no agreement has been reached between the Retail Store Employees Union Local 880 – and the management of HILL'S DEPARTMENT STORE. Important issues still not resolved include Union

[Footnote continued on following page]

According to the petition:

> "When [the Union's] commercial message was first offered to the stations in early 1966, there was no difficulty, no objection, no hesitation in using it. Then, suddenly, without warning, or without adequate explanation, all within a period of a few days, station after station in Northeast Ohio found it necessary to cut off the Union's advertising.
>
> "An important consideration is that at the same time, Hill's was engaged in commercial advertising over the stations involved, broadcasting its message of bargains for the consumer.
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> . . . . . .
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> "One needs to be neither cynic nor seer to understand why the Union was deprived of its right to advertise to the public on an issue of such a controversial nature. The answer is as old as the history of human pressure: one may assume that Hill's passed the 'word' to the Station, and that was enough."

In its answer to the petition Station WREO denied that it had violated the Fairness Doctrine and said that the station had offered to present without charge a program on which both the Union and Hill's Department Store could express their views.

The Union's petition was not supported by affidavit as required by §309(d)(1) of the Communications Act, 47 USC §309(d)(1). 2/ Nevertheless the Commission, as it was empowered to do under 47 USC §308(b), by written questions required further written statements of fact from Station WREO. 3/ From these statements it appeared that between February 16 and April 5, 1966, WREO carried approximately 322 of the Union's announcements. The

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1/ [Footnote continued from preceding page]

Security, Arbitration and Grievance Procedure, Health and Welfare, Funeral Leave, and Visitation Rights to the store. These, and other issues are vital to the betterment of the store employees working conditions! Some Hill's employees are still working because – if they all go out – the Company would try to replace them with non-union help who could be granted a vote in subsequent elections. The 2,000 area members of Retail Store Employees Union Local 880 request that all union members, their families and friends observe and respect the picket line now at HILL'S DEPARTMENT STORE!"

2/ Subsequently, on September 12, 1968 counsel for the Union verified the petition.

3/ Any falsification in the statements furnished by the station would have been subject to the penalties provided in 18 USC §1001.

announcements were discontinued on April 5, 1966. According to the station the reason for the discontinuance was that "the continuous repetition of these partisan announcements had become an irritant to WREO's listening audience"; that the station felt it would "have no further part in the controversy which was going on between the Union and Hill's Department Store".

Both the station and Hill's flatly denied that the store or anyone on its behalf had sought to influence WREO in the matter of the cancellation of the Union's announcements. It was conceded that commercial advertisements on behalf of Hill's Department Store were carried by the station throughout the year 1966.

On these facts the Commission in its Memorandum Opinion concluded first that the Union's petition to deny was defective, in that it was not supported by a statement under oath that the allegations contained therein were true to the personal knowledge of the affiant. The Commission concluded further:

> "As to the fairness aspect, the licensee has presented the Local 880's advertisements, and after notifying Hill's and Local 880 that it would air no more announcements on the subject of the Ashtabula strike, it issued both sides an invitation to air their respective views on the strike over its facilities free of charge. In the circumstances, there is no need to consider further issues under the fairness doctrine. Further, we hold that WREO's refusal to accept additional ads from Local 880 after April 1966 was, for the reasons advanced by the station, within the proper limits of its discretion (McIntire v. Wm. Penn Broadcasting Co., 151 F2d 597, (1945))."

Finally, the Commission found that there were no unresolved questions of fact remaining and that the grant of the WREO renewal would serve the public interest, convenience and necessity; and accordingly, the Union's petition was denied.

On this appeal the Union in its brief concedes that, "The Union was unable to substantiate its claim that Hill's had brought pressure on the stations, which reduces the issues here primarily to the fairness doctrine and collateral legal questions involved, including that of a hearing." In substance the Union argues that the Commission was arbitrary and capricious in finding, without a hearing, that WREO had not violated the Fairness Doctrine.

The Communications Act provides that no hearing on a petition to deny the renewal of a broadcast license need be held if the petition fails to contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that the renewal would be prima facie inconsistent with the public interest, convenience and necessity. 47 USC §309(d)(1). If there are no substantial and material questions of fact and the renewal would be consistent with the public interest, convenience and necessity the petition shall be denied and the renewal granted without a hearing. 47 USC §309(d)(2). If the Commission cannot make such a finding, however, and if a substantial and material question of fact is presented, the application for renewal shall be

set for hearing on the issues raised. 47 USC §309(e). See Southwestern Operating Company v. FCC, 122 US App DC 137, 351 F2d 834 [5 RR 2d 2121] (1965). The question before us therefore is whether the Commission acted arbitrarily and capriciously in finding that there was no substantial and material question of fact with respect to the alleged violation of the Fairness Doctrine by Station WREO, and in finding without a hearing that a renewal of the station's license would be consistent with the public interest, convenience and necessity.

The essential facts material to the alleged violation of the Fairness Doctrine by the station are plain. Over a period of approximately seven weeks in 1966 the station broadcast some 322 of the Union's announcements. The announcements were then discontinued by the station for the assigned reason that they were annoying to listeners and that the station did not choose to become involved in the labor dispute. During this same period the station broadcast commercial advertising for Hill's Department Store, and these broadcasts were continued after the Union announcements were stopped. On these facts the Commission held as a matter of law that there had been no violation of the Fairness Doctrine by Station WREO.

The Fairness Doctrine promulgated by the Commission requires that a broadcaster give adequate coverage to public issues and that coverage must be fair in that it reflects the opposing views. Red Lion Broadcasting Co. v. FCC, 395 US 367, 377 [16 RR 2d 2029] (1969). The interpretation and application of the Doctrine are primarily matters confided to the sound judgment and discretion of the Commission. Cf. Udall v. Tallman, 380 US 1, 16 (1965). In the administration of the Doctrine the Commission has stated that the selection and presentation of program material are the responsibility of the licensee, not the Commission; and all the Commission requires is that the licensee make a reasonable effort in good faith to give a fair and well-rounded presentation of public issues. See Report on Editorializing by Broadcast Licensees, 13 FCC 1246 [25 RR 1901] (1949); Letter to Oren Harris, 3 Pike & Fischer, RR 2d 163, 167 (1963; Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance (Fairness Primer), 29 Fed Reg 10415, 10416 [2 RR 2d 1901] (1964). In many decisions applying these principles to specific cases the Commission has held that broadcasters have a wide area of discretion in which to exercise their journalistic judgment in complying with the Fairness Doctrine, and that review by the Commission of the actions of licensees in this area is limited to a determination of the good faith and reasonable nature of such actions. See Citizens Against Proposition 15, 3 Pike & Fischer, RR 2d 777 (1964); Mid-Florida Television Corp., 4 Pike & Fischer, RR 2d 192 (1964); Mrs. Madalyn Murray, 5 Pike & Fischer, RR 2d 263 (1965); American Friends of Vietnam, Inc., 6 Pike & Fischer, RR 2d 126 (1965); Miss Geri Tully, 6 Pike & Fischer, RR 2d 123 (1965). It is established law that the scope of this court's review in such cases is limited and that when there is a rational basis in the record for the result reached by the Commission its action should be affirmed. See Red Lion Broadcasting Co. v. FCC, 395 US 367 [16 RR 2d 2029] (1969); Udall v. Tallman, 380 US 1, 16 (1965); United States v. Storer Broadcasting Co., 351 US 192 (1956); McCarthy v. FCC, 129 US App DC 56, 390 F2d 471 [12 RR 2d 2003] (1968); Philadelphia Television Broadcasting Co. v. FCC, 123 US App DC 298, 359 F2d 282 [7 RR 2d 2019] (1966).

The Commission in its brief, and for the purposes of this litigation, assumes that the Fairness Doctrine applies in the circumstances of this case. Assuming that the Fairness Doctrine applies, I would hold that the Commission's decision to renew WREO's license has a rational basis in the record and is a reasonable application of the Doctrine. I would hold further that on the undisputed facts no hearing was necessary.

There is a reasonable basis in the record for the Commission's conclusion that WREO dealt with the Union fairly and in good faith. The station carried the Union's message on 322 occasions over a period of weeks, so that the public was fully advised as to the Union's views with respect to the pending labor dispute. In addition, the station offered free time to the Union to present its views in a discussion program with representatives of the store. The offer was rejected by the Union. Finally, as the Union now concedes, investigation disclosed that there was no basis in fact for the allegation that in terminating the Union's announcements the station acted in bad faith as a result of pressure by the department store. On such a record I cannot say that the Commission was arbitrary or capricious in finding that there was no violation of the Fairness Doctrine.

The Commission's decision with respect to the station's alleged violation of the Fairness Doctrine was based upon the facts disclosed in the pleadings and developed by the Commission's own investigation. In this situation it was not unreasonable for the Commission to conclude that no hearing was necessary; for the facts having been established, there was nothing to hear. In my judgment a "suspicion that something might have been amiss", upon which the majority opinion relies, was not enough to call for a hearing.

The only remaining question was whether the Union alleged facts sufficient to make a prima facie showing that renewal of WREO's license would not serve the public interest, convenience and necessity. Since the Union's petition was based wholly on an alleged violation of the Fairness Doctrine, a violation the Commission did not find, the answer to this question was plainly no. I conclude, therefore, that renewal of WREO's broadcasting license was not arbitrary or capricious and that the action of the Commission should be affirmed on this ground.

Although for the purposes of discussion I have accepted the Commission's assumption that the Fairness Doctrine could be applied in this case, I think the assumption is invalid. Specifically, I cannot accept the implicit premise of the majority opinion, that when a radio station has broadcast advertisements of the goods or services of a private business which is engaged in a dispute with a labor union, the Fairness Doctrine requires the station to broadcast the union's views on the labor dispute. In my judgment this case illustrates the fallacy of that premise.

According to the Union's broadcast message the important unresolved issues in its dispute with the store were "Union Security, Arbitration and Grievance Procedure, Health and Welfare, Funeral Leave, and Visitation Rights to the store". See Note 1, above. The store's routine advertisements of goods and wares for sale were not relevant to the issues thus formulated by the Union, that is, the advertisements were not a presentation of the store's side

of the labor controversy. Accordingly, there was no occasion to invoke the Fairness Doctrine to assure that the Union's side would be heard.

The theory of the majority would extend to the store's advertisements the rule applied by the Commission in the case of cigarette advertising. In the Matter of Television Station WCBS-TV, New York, New York (Applicability of Fairness Doctrine to cigarette advertising) 9 FCC 2d 921 [11 RR 2d 1901] (1967). As the Commission in its opinion emphasized, however, "cigarette advertising presents a unique situation". (9 FCC 2d at 942, 943.) I cannot agree that the principle of that decision ought to be applied to the commercial advertising of a department store simply because the store at the moment is involved in a labor dispute.

CITIZENS COMMITTEE v. FEDERAL COMMUNICATIONS COMMISSION

STRAUSS B/CASTING CO. OF ATLANTA, Intervenor

U. S. Court of Appeals, District of Columbia Circuit, October 30, 1970

No. 23,515

[¶10:405] Effect of failure of Commission to act on petition for reconsideration within 90 days.

Where a petition for reconsideration of a Commission order granting an application without hearing was not acted on within 90 days of the filing of the petition, an order denying the petition was not invalid and petitioner's request for a hearing was not to be taken as granted. Both parties had sought the opportunity to file additional pleadings, and the Commission had been advised that negotiations were in progress to resolve the controversy. Under such circumstances the Commission was entitled to think that the statutory time requirement had been waived. Citizens Committee v. FCC, 20 RR 2d 2026 [US App DC, 1970].

[¶10:309(A)(11), ¶10:310, ¶53:24(R), ¶53:24(Z)(7)] Right to hearing on assignment application.

Where the transferee of Atlanta, Georgia, AM and FM stations propposed to change the programming format from classical music to a blending of popular favorites, broadway hits,, musical standards and light classical music, based on a program preference survey which showed that only 16% of the people interviewed preferred the

DAVID GREEN, Individually and as Chairman of the PEACE COMMITTEE OF THE BALTIMORE MEETINGS OF THE RELIGIOUS SOCIETY OF FRIENDS, et al. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES

NATIONAL B/CASTING CO., INC.

U. S. Court of Appeals, District of Columbia Circuit, June 18, 1971

Nos. 24,470; 24,516

[¶10:315(G)(1), ¶10:405] Fairness doctrine standards.

The essential basis for any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed. On the record, in connection with petitions seeking time to reply to Armed Services recruitment announcements, it was inconceivable that any American had been uninformed about the desirability or undesirability of military service, the draft, or the Vietnam war. The participation of petitioners, under any doctrine of fairness, was not necessary to an informed public. To the extent that the FCC enunciation of the fairness doctrine may lack the precision of standards to determine what is the issue, whether the issue is controversial, and whether the licensee has presented a balanced coverage, at no time did petitioners urge on the Commission a different standard than that already promulgated. Petitioners should have sought reconsideration under Section 405 of the Communications Act before seeking judicial review. It was not appropriate to review the adequacy of the standards of the fairness doctrine. Green v. FCC, 22 RR 2d 2022 [US App DC, 1971].

[¶10:315(G)(1)] Military recruitment announcements.

Commission finding that licensees who had broadcast military recruitment announcements made a good faith, reasonable judgment that voluntary military recruitment in itself was not controversial and was not an issue of public importance, is sustained by the court. Action of those seeking to reply to the announcements in interpreting them as involving the draft and the Vietnam war gives a broader interpretation than the stations, the

Commission and the court believe to be justified. Taking the issue as thus broadened, there was no allegation that there was inadequate coverage of the issues of the draft and the Vietnam war by the stations. As to the even broader issue of the morality of participating in any war, this issue too had been aired on many television stations and would have been at least peripherally involved in the programs offered to petitioners, but declined. The issue of the desirability or undesirability of military service goes to the issues of the draft and the war. The undesirable features of military life have been given extensive coverage on television. Green v. FCC, 22 RR 2d 2022 [US App DC, 1971].

[¶10:315(G)(1)] Inapplicability of the Banzhaf decision.

The Commission's ruling in the Banzhaf [cigarette] case is not applicable to the matter of replies to military recruitment announcements. It is not every advertisement carrying a controversial message which calls for response through a similar spot announcement format. The emphasis in Banzhaf was on the uniquely serious and well-documented hazards to the public health inherent in cigarette smoking. Reasoning that because of the possibilities of grave physical injury and death associated with service in Vietnam, military recruitment ads raise issues equally as significantly related to the general public health as do cigarette commercials and therefore require similar treatment under the fairness doctrine, overlooks the crucial point that the fairness doctrine's goal is the "promotion of informed decision-making by the public". "It is the right of the public to receive suitable access to . . . ideas and experiences which is crucial here," rather than the desire of those who espouse competing views to express their opinions no matter how fully the same subject matter is covered in the licensee's programming or is patently apparent to the public. Green v. FCC, 22 RR 2d 2022 [US App DC, 1971].

Petitions for Review of Orders of the Federal Communications Commission [19 RR 2d 498, 501].

Mr. Albert H. Kramer for petitioner in No. 24,470.

Mr. Donald A. Jelinek for petitioners in No. 24,516.

Mr. Richard R. Zaragoza, Counsel, Federal Communications Commission, with whom Mr. John H. Conlin, Associate General Counsel, Federal Communications Commission, was on the brief, for respondents. Mr. Henry Geller, General Counsel at the time the record was filed, entered an appearance for respondent Federal Communications Commission. Mr. Howard E. Shapiro, Attorney, Department of Justice, entered an appearance for respondent United States of America.

Mr. Donald J. Mulvihill, with whom Messrs. Mathias E. Mone, Howard Monderer and Roy L. Regozin were on the brief, for intervenor National Broadcasting Company, Inc.

Messrs. James A. McKenna, Jr. and Vernon L. Wilkinson entered appearances for intervenor American Broadcasting Companies, Inc. in No. 24,516.

Before McGowan, Robinson and Wilkey, Circuit Judges.

Wilkey, Circuit Judge: Petitioners in both cases seek review and reversal of a ruling of the Federal Communications Commission that no violation of the agency's fairness doctrine occurred when stations in Washington, D. C., and San Francisco, California, refused to donate time to the petitioners for the purpose of broadcasting messages opposing military service or informing the public of alternatives to military service, after the stations had aired recruiting announcements in behalf of the Armed Services. We sustain the Commission's conclusion that the petitioners have not shown that the various licensees' exercise of judgment under the fairness doctrine was unreasonable, arbitrary, or in bad faith.

I. Facts and Administrative Agency Action

The military recruitment announcements broadcast were appeals for voluntary enlistment in the various branches of the Armed Forces. 1/ The recruitment

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1/ Two typical examples are:

SPOT NUMBER ONE

"Are you a young man who likes a challenge and who likes to do his best at anything he does? Well if you are . . . the United States Army needs you. Life in the Army demands the very best you have . . . and in return the Army offers you educational opportunties . . . travel . . . good pay . . . and most important . . . the opportunity to make a really worthwhile contribution to the security of your country. For all the facts . . . visit your local Army recruiter. Your future . . . your decision . . . choose Army."

SPOT NUMBER SEVENTEEN

"Ask a marine officer what it means to be a marine lieutenant. Ask him what it takes to lead a marine platoon. He'll tell you its about the toughest postgraudate course a college man ever had.

[Footnote continued on following page]

announcements in themselves did not dwell upon the Vietnam War, or upon warfare in general, and only one of eighteen different announcements alluded to the draft. 2/ Admittedly, they sought to present the attractive, positive, and advantageous side of military service.

Petitioner Green (No. 24,470), individually and as Chairman of the Peace Committee of the Baltimore Meeting of the Religious Society of Friends, wrote to television broadcasting stations in the Washington area to request "free air time to rebut the claim made by the numerous military recruitment advertisements presented on your station that a career in the armed forces is desirable, rewarding, and the best way to serve one's country." In response to some of the licensees' requests, petitioner Green submitted a proposed announcement as his presentation of a fair response to the issues he and the Committee asserted were raised by the military recruitment messages. 3/ All three network TV stations in the Washington area declined to broadcast the proffered spot announcement, but all three offered an opportunity to petitioner Green and members of his group to appear on other programs discussing the question of the military draft as a controversial issue of public importance. The offers of two stations were rejected by petitioner Green and a complaint was filed with the FCC.

On behalf of petitioner G. I. Association and the other parties (No. 24,516), a letter was addressed to twenty-seven radio and television stations in the San Francisco area requesting an opportunity under the fairness doctrine to

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1/ [Footnote continued from preceding page]

He'll tell you it takes every ounce of leadership you've got, because a fighting man just doesn't come any finer than a marine. And if you can lead a platoon of marines, you can lead anybody. Anywhere, anytime. Refrain: Ask a marine."

2/ The text of the one spot announcement alluding to the draft reads:

"This is Frank Blair speaking to young men facing a military obligation. As a father, I was pleased when my sons Thomas and John told me they wanted to become Marines. They told me that there was more than one way to look at an obligation: to consider it something you have to do, or as an opportunity to grow as an individual. How about you? Are you ready to develop in body, mind and spirit? Find out the details from your Marine Corps representative today."

3/ The text of petitioner's announcement is as follows: ". . . Christina spends her time trying to forget, but can't. For every draftee that goes off to war there is a Christina left behind – sometimes for good. . . . There are legal alternatives to military service. You may be entitled to one of a number of deferrments [sic] provided by law. For information write to this address. . . ."

broadcast petitioners' views in opposition to the military recruitment announcements. The letter alleged that in none "of the recruitment advertisements on your station that have come to our attention (is it indicated) that an individual's participation in the armed services could lead to his involvement in the Vietnam war, . . . Nor is it indicated in any of the recruitment advertisements that many deferments to military service are available under present laws and regulations." With the letter was enclosed a sample spot announcement entitled "Draft Counseling," setting forth petitioners' view on the alleged controversial issue. 4/ Those broadcast stations which were solicited denied the request, after which complaint was made to the FCC.

By letters ruling simultaneously on the two requests, the Federal Communications Commission decided that the broadcast stations did not act unreasonably

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4/ The text of petitioners' sample radio announcement was as follows:

Draft Counseling

"Attention all men of draft age. What are planning to do about the draft? It is not generally known, but the selective service law does provide many deferments to which you may be entitled. If the army is not your bag, and you feel you may be eligible for a deferment – do something about it now. Phone 642-1431 for free information. Draft counselors and attorneys are available throughout the Bay Area. That phone number again is 642-1431."

Petitioners also included in Appendix V of their complaint to the FCC additional sample spot announcements, but that appendix does not appear to have been included in the record on appeal. The texts of these spot announcements however, were included in the brief filed by NBC and, no exception having been taken by any party to their accuracy, we quote them as follows:

60-Second Proposed Radio Spot

"Annr: Thinking about joining the Army? Before you do, consider the facts. Chances are, the only job you'll learn is how to kill. Chances are, you'll wind up in Vietnam, killing and perhaps getting killed, in a war that doesn't make much sense. So if you're thinking about the military, remember this: You may be eligible for a military deferment. . . ."

Proposed Television Spot

"Opening shot of a young man standing in front of a row of gravestones in the Presidio of San Francisco.

"Young man: It was my experience as a captain in Vietnam. . . .

"Camera shifts to a second young man, kneeling in front of a single gravestone. As he speaks, the camera backs away to catch sight of more and more and finally hundreds of graves.

[Footnote continued on following page]

in refusing the petitioners' requests, declined to disturb the judgment of each television and radio licensee, and determined that no further action was warranted at that time. The Commission considered that the crucial question was "whether Armed Forces recruitment messages constitute the presentation of one side of a controversial issue of public importance" and concluded that they did not. 5/ The Commission noted that the petitioners themselves seemed to view the recruitment messages as controversial because they were inextricably involved with the Vietnam war and the draft, one strong

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4/ [Footnote continued from preceding page]

"Second young man: I was an enlisted man in Vietnam. . .

"Announcer: Chances are the Army will teach you how to kill. Chances are you'll wind up in Vietnam and perhaps get killed in a war that doesn't make sense. Remember this: You may be eligible for military deferment. For free information call 642-1431. . . ."

5/ In the letter to the G.I. Association representative the Commission concluded:

"In the present case, we do not believe that the broadcast of Armed Forces recruitment messages. . . raises a controversial issue of public importance requiring presentation of conflicting viewpoints. We note that the power of the Government to raise an army has not been questioned; rather the thrust of the complaint is an objection to the use made of the army (war in Vietnam) and the manner in which manpower is conscripted (Selective Service draft).

"In reaching this conclusion we also note that complainants themselves reason that recruitment messages are controversial <u>because</u> they are inextricably intertwined with the conduct of the war in Vietnam and the Selective Service draft. There is no indication that any of the stations against whom the complaint was filed have failed to treat the issues of Vietnam and the draft (both concededly controversial issues of public importance) in conformance with the fairness doctrine. Moreover, the only indication as to what complainants consider the 'opposing viewpoint' to the Armed Forces recruitment announcements is one spot announcement entitled 'Draft Counseling,' which offers information pertaining to draft deferments. The fact that Vietnam and the draft are controversial issues of public importance does not, in our view, automatically require that recruitment messages also be considered as such, and we are unable to conclude that it was unreasonable for the broadcast stations in the San Francisco area to decline to broadcast the 'opposing' spot announcements."

Similarly, to the representative of the Friends Peace Committee the Commission said:

[Footnote continued on following page]

indication of that being that the proposed spot announcements submitted both Washington and San Francisco dealt in unmistakable terms with the draft and the Vietnam war, not with the merits of voluntary enlistment alone. On the issues of the Vietnam war and the draft the Commission concluded that all television and radio stations which had been requested to broadcast petitioners' spot announcements were giving a full coverage to these issues; indeed this was not controverted.

II. Federal Communications Commission Standards for the Fairness Doctrine

To invoke the fairness doctrine, all parties recognize that there must exist a "controversial issue of public importance" on which the licensee has refused to allow the presentation of a reasonably balanced point of view. Petitioner in No. 24,470 urges that the difference of opinion as to what issues were raised by the recruitment announcements was caused by the FCC's failure to promulgate adequate standards to guide broadcasters in determining their obligations under the fairness doctrine, and he seeks not only a reversal of the Commission's ruling in this case but also a declaration from us that the Commission's fairness standards are inadequate. Petitioner Green argues that the FCC's rule of deferring to "reasonable" fairness doctrine determinations by a licensee violates the public interest standard of the Communications Act, and the First and Fifth Amendments because this rule is too vague and imposes a prior restraint on expression. He asserts that the FCC should be required to promulgate specific standards to determine (1) what is the issue, (2) whether the issue is controversial, and (3) whether the licensee has presented a balanced coverage.

At the outset we note that the fairness doctrine was most recently elaborated by the FCC 6/ in response to the Supreme Court's decision in Red Lion

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5/ [Footnote continued from preceding page]

"[W]e note that the announcements which the Friends Peace Committee seeks to have broadcast does [sic] not deal with the issue of whether there should be armed forces, but rather focuses on the draft. . . . Absent evidence that stations WMAL and WRC have failed in their overall programming to achieve fairness in their coverage of the controversial issue here involved (i. e., the draft), the Commission will not disturb the licensees' determination as to how to best inform the public of the various facets of issues of controversial public importance."

6/ In re Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 FCC 2d 27, 28 (1970).

"The fairness doctrine was evolved as a policy under the public interest standard in a series of cases, given its definitive policy statement in the Commission's 1949 Editorializing Report (13 FCC 1246), and codified into the Communications Act in 1959.

[Footnote continued on following page]

Broadcasting Co., Inc., v. FCC. 7/ The Supreme Court itself enunicated two bases for the fairness doctrine: first, the statutory basis, that broadcast facilities must operate in the public interest; second, that under the First Amendment the public has a right to free and open debate. The Commission's rule provides that if one position on a controversial issue of public importance is broadcast twice within a period of six to nine months, or if the licensee itself editorializes on the air, the licensee has an affirmative duty to seek a spokesman for the other point of view. As to how the conflicting points of view are presented, a licensee can present conflicting views in any fashion, so long as the balance in format, time, protagonists, etc., meets a test of "reasonableness." 8/ In addition to achieving a balance in presentation of

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6/ [Footnote continued from preceding page]

See Section 315(a) USC §315(a); Red Lior Broadcasting Company, Inc. v. FCC, supra. It requires the broadcast licensee to afford reasonable opportunity for the discussion of conflicting viewpoints on controversial issues of public importance. The Commission early determined that if the fairness doctrine were to achieve its most salutary purpose, an affirmative obligation in this respect must be imposed upon the licensee. . . ."

"The Commission's general approach to this facet of the fairness doctrine is set forth in a 1964 ruling, Letter to Mid-Florida Television Corporation, 40 FCC 620, 621 (1964):

> ". . . The Commission does not seek to establish a rigid formula for compliance with the fairness doctrine. The mechanics of achieving fairness will necessarily vary with the circumstances, and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often combinations of various methods. . . .'"

7/ 395 US 367 [16 RR 2d 2029] (1969).

8/ The Commission said:

"The fairness doctrine deals with the broader question of affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Generally speaking, it does not apply with the precision of the "equal opportunities" requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation – as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other

[Footnote continued on following page]

conflicting views, this rule purports to foster self-regulation, to avoid any implication of censorship by the Commission, and to enable the broadcasters themselves to safeguard their economic interests in allocation of time.

The fairness doctrine is not to be confused with the doctrine of "equal time" which directs in firm statutory language (§315) that licensees treat equally all legally qualified candidates for public office, 9/ under the fairness doctrine

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8/ [Footnote continued from preceding page]

facets of such programming. See par. 9, Editorializing Report. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'equal opportunities' requirement."

In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 FCC 598, 599 [2 RR 2d 1901] (1964).

9/ Section 315 reads in pertinent part:

"§315. Candidates for public office; facilities; rules

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . . Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The FCC commented:

"While Section 315 thus embodies both the 'equal opportunities' requirement and the fairness doctrine, they apply to different situations and in different ways. The 'equal opportunities' requirement relates solely to use of broadcast facilities by candidates for public office. With certain exceptions involving specified news-type programs, the law provides that if a licensee permits a person who is a legally qualified candidate for public office to use a broadcast station, he shall afford equal opportunities to all other such candidates for that office in the use of the station."

In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 FCC 598, 599 [2 RR 2d 1901] (1964).

identical treatment of both sides of the issue is not necessary, as this would place an onerous and impractical burden on the licensees. A further difference, no individual member of the public has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom. While we observe that the three network licensees in the Washington area all invited petitioner Green to appear in one program format or another, clearly under the FCC fairness doctrine the licensees were not obligated to have any particular advocate appear at all. The fairness doctrine is issue-oriented, and it would be sufficient if each licensee could show that the point of view advocated by petitioner Green had been or was being presented on its station by others.

In our view, the essential basis for any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed. On the record in this case, no matter how the issue is taken, we cannot conceive that any live American has been left uninformed about the desirability or undesirability of military service, the draft, or the Vietnam war. We do not see that the participation of either petitioner Green and his group, or the G.I. Association and the other petitioners, under any doctrine of fairness, would be necessary to an informed public.

To the extent that the FCC enunication of the fairness doctrine may lack the precision of stardards which petitioner Green believes necessary, it is sufficient answer to point out that at no time did petitioners urge upon the Commission a different standard than that already promulgated by the FCC. Under §405 of the Communications Act this would seem to be a classic case for seeking reconsideration by the Commission before coming here for judicial review of the Commission's action. 10/ If the Commission standards for the fairness doctrine are deficient (we by no means infer that they are), surely the Commission itself deserves the first opportunity to improve those standards, and in so doing it should have the benefit of whatever assistance petitioner Green and his group can give. A proffer of such to the Commission was not made in this case. Therefore, we do not think it appropriate to review here the adequacy of the standards of the fairness doctrine as already enunciated by the FCC.

III. The Issues and the Fairness Doctrine Applied Thereto

To invoke the fairness doctrine as a ground for obtaining access to the air waves, it is not only necessary to define a controversial issue of public importance, but implicitly it is first necessary to define the issue. Intermixed in the exchange of letters and legal papers among the parties, and in

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10/ Section 405 provides in pertinent part:

> "The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review . . . (2) relies on questions of fact or law upon which the Commission or designated authority within the Commission, has been afforded no opportunity to pass."

argument before, there appear to be five different issues around which the petitioners and other parties have circled, trying to define "the issue," each in his own light: (1) military manpower recruitment by voluntary means, (2) the draft, (3) the Vietnam war, (4) the morality of participation in any war, and (5) the "desirability" of military service.

1. Military manpower recruitment by voluntary means.

We consider that the first issue, military manpower recruitment by voluntary means, is all that was implicit in virtually all the Armed Services recruitment announcements. If this is the issue raised, is it a "controversial issue of public importance"? To oppose all enlistment, even voluntary, would be in effect to urge the abolition of United States military forces. As the Commission stated, "We note that the power of the Government to raise an army has not been questioned." Nor do petitioners contend that the concept of unilaterally abolishing all United States military forces at the present time is "a controversial issue of public importance" demanding allocation of broadcast time. Indeed, in their briefs and at oral argument, the petitioners seemed to shy away from so defining the issue.

Hence, the licensees concluded that voluntary military recruitment in itself was not controversial and was not any issue of public importance. The FCC decided that it was not unreasonable for the licensees to so conclude in regard to the Armed Services military recruitment announcements. On review here, we sustain this finding of the Commission that the licensees made a good faith, reasonable judgment on this question, which is all that is required under the fairness doctrine.

2 and 3. The draft and the Vietnam war.

The petitioners did not treat the military recruitment announcements as being of such limited import, but rather treated the issue involved here as being (2) the draft and (3) the Vietnam war. It is readily apparent that both groups of petitioners in Washington and in San Francisco, when they came to submit their proposed replies to the Armed Forces recruitment announcements, immediately enmeshed themselves in opposition to the draft and the Vietnam war. 11/ Analysis of the spot announcements proposed by both petitioners as rebuttals to the military recruitment announcements shows that in each case there was an anti-Vietnam and anti-draft pitch. For example, petitioner Green's submitted announcement referred to "every draftee," "legal alternatives to military service," "deferments." One who voluntarily enlists, which is the object of the recruitment announcements, is not a draftee. Legal alternatives to military service only have reference to the draft, there is no problem of legal alternatives to voluntary enlistment. Nor is there any such thing as a deferment from voluntary enlistment.

The proposed radio spot of petitioner G.I. Association was entitled "Draft Counseling," and discussed the draft and possible deferment exclusively.

11/ See footnotes 3 and 4, supra.

The sample television spot focused on a young man standing in front of a row of gravestones, and his first words were to be, "It was my experience as a captain in Vietnam." The second young man, likewise silhouetted against a large cemetery, was to start off, "I was an enlisted man in Vietnam," and referred to "the problems of what is basically a civil war." The announcer was to refer to "a war that doesn't make sense," and to "military deferment."

This was the basic content and theme which the petitioners wished to get across to the American public. This action of the petitioners themselves placed a broader interpretation on the military recruitment announcements than either the stations, the FCC, or we feel is justified.

But taking the issue as thus broadened by the petitioners themselves, in neither case is there any allegation that there is no adequate coverage of these issues by the licensees at the present time. 12/ It is not only apparent that the draft issue and the Vietnam war issue are issues of overwhelming importance, but also equally undeniable that these issues have been ventilated in extens) for years on (probably) every television and radio station in the land. If the draft and Vietnam are properly the issues raised, and petitioners' own submitted announcements seem to indicate they are, then there can be no complaint under the fairness doctrine that these licensees and others have not given full a d adequate coverage to these issues. And, as a matter of record, the particular broadcast stations here involved did offer the petitioners and the groups they represent an opportunity to participate in programs dealing with these broader issues. Petitioner Green and his group accepted the offer of one TV station in Washington; they chose to reject the offers of the other two TV stations as not being responsive to their request.

4. The morality of participating in any war.

In regard to the even broader issue, (4) the moral question of participation in any war, this too is an issue which we believe has been aired on many television stations (the record is not clear as to these particular licensees), and would have been at least peripherally involved in the programs offered by these licensees to the petitioners here. But petitioners in their briefs have not claimed that this is properly the issue raised, and in oral argument seemed to abjure any such philosophical question.

5. The desirability of military service.

By the time of oral argument both groups of petitioners preferred to define the issue as whether military service was 'desirable rewarding, or the best way to serve one's country," according to petitioner Green, and simply as whether military service was "desirable," according to the petitioner G. I. Association. Yet even taking this as the defined issue, it is obvious that

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12/ In both cases in identical language the Commission found: "There is no indication that any of the stations against whom the complaint was filed have failed to treat the issues of Vietnam and the draft (both concededly controversial issues of public importance) in conformance with the fairness doctrine."

desirability or undesirablity of military service comes right back to the draft and the Vietnam war. These features of desirability are exactly what both petitioners dramatized in their proposed spot announcements (see footnotes 3 and 4). And as we have made clear, and as no one contends otherwise, as issues the draft and the Vietnam war have been covered in multiple facets.

Considering the argument as phrased in terms of desirability, although generally agreeing in thus defining the issue, the two groups of petitioners took a different view on the way in which the fairness doctrine should be applied and the fact situation as to broadcast coverage. In response to a direct question by the court, petitioner Green flatly said that to his knowledge there was nothing now being shown on television which demonstrated that military service is undesirable. 13/ On known facts of common experience, we think this position verges on the incredible. Unless casual viewing over the past seven years has been totally unrepresentative, it is our opinion that the undesirable features of military life have been displayed in virtually every living room in the country, frequently in full living (or dying) color, in the American television networks' endeavor to bring the Vietnam war and all of its miseries home to the American people. To say that these national network television stations have not given adequate and complete coverage to the undesirable features of military life in our age, to ignore the past six years' television coverage of the American military effort in Southeast Asia, not to mention the weekly casualty figures routinely broadcast by the networks, and therefore to maintain that under the fairness doctrine the spot announcements or something similar thereto and the personal message of these petitioners on the airways is necessary to counteract the otherwise prevailing propaganda of the military forces that military service is exclusively desirable and good for you, is beyond our acceptance. 14/

13/ At oral argument there occurred the following colloquy between the court and petitioner Green's counsel:

"Q.: Is there anything on TV that supports your point of view that military service is undesirable?

"COUNSEL: Not to my knowledge.

"Q.: On television?

"COUNSEL: Not to my knowledge.

"Q.: There's nothing on television that you've seen in the last year or five years that indicates to young men that military service is not desirable?

"COUNSEL: Not to my knowledge.

"Q.: Thank you."

14/ We do not suggest that a licensee charged with violation of the fairness doctrine may seek absolution by reference to compliance with it by other

[Footnote continued on following page]

Petitioner G. I. Association took a different approach. Its counsel, in response to the same or similar question, admitted that the American public was not unaware of the undesirable features of military service, but argued that prior to the military recruitment announcements there was somewhat of a balance presented to the public as to the desirable and undesirable features, and that the addition of the military recruitment announcements to television time had thus upset the balance in favor of these "highly effective spot announcements." We will not attempt to assay here what balance or lack of balance there has existed and does exist in a presentation of the desirable and undesirable features of military life; it is sufficient to point out that under the fairness doctrine it is not necessary that there be an absolute equality of either time, time of viewing, or dramatic impact, or absolute equality in any other criteria for the points of view presented under the fairness doctrine. What the petitioners are apparently confusing with the fairness doctrine is the doctrine of equal time, which has no relevance whatsoever to the issues in this case. Unlike the "equal opportunities" requirement, which as we have already pointed out deals with legally qualified candidates for public office, the question under the fairness doctrine is one of reasonableness of the station's action, and not whether absolute equality in allocation of time, time of day, or any other criteria, has been achieved.

IV. Inapplicability of the Banzhaf Decision Here

Petitioners in No. 24,516 have taken the position, both before the Commission and now before this court, that their complaint is controlled by, and is indistinguishable from, the Commission's landmark cigarette advertising ruling, 15/ Applicability of Fairness Doctrine to Cigarette Advertising, 9 FCC 2d 921 [11 RR 2d 1901] (1967), aff'd sub nom. Banzhaf v. FCC, 132 US App DC 14, 405 F2d 1082 [14 RR 2d 2061] (1968), cert. denied sub nom. Tobacco Institute v. FCC, 396 US 842 (1969). Since the Commission found that the several issues – both explicit and implicit – surrounding military recruitment advertising were either not controversial matters of public importance (i.e., whether the United States should maintain an armed force) or were adequately covered by the various licensees (the draft and Vietnam),

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14/ [Footnote continued from preceding page]

licensees. In each of the cases before us, however, the licensees complained of were expressly identified, and it was not alleged that any one of them was failing to discharge its public service obligation in respect of Vietnam and the draft. See footnote 12, supra.

15/ Petitioners in No. 24,470, on the other hand, have persistently eschewed any reliance on Banzhaf and have instead contended that their complaint may be resolved according to conventional fairness doctrine standards. Indeed, they have not insisted on spot announcements but have indicated their readiness to accept any "forum adequate to balance the views already presented by the licensees."

no discussion of the scope of its "cigarette case" was required. Likewise, the General Counsel for the FCC in his brief in this court, reasoning that "the determination of whether to extend the cigarette ruling to the broadcast of military recruitment announcements is a policy judgment to be made initially by the Commission," did not address himself to the merits of petitioners' contentions on this issue.

Our disposition of petitioners' complaint, compatibly with the agency's ruling, renders extended evaluation of the similarities and dissimilarities between this case and Banzhaf, strictly speaking, unnecessary. However, petitioners' dogged reliance on that case, as well as Commissioner Johnson's lengthy dissenting discussion, compels us to interject a word of explanation regarding the matter of analogy to the cigarette litigation. Petitioners claim that Banzhaf sweepingly holds that "when one side of a controversial issue is presented in the form of frequent spot announcements, the other side must be allowed to present its views in a similar fashion." We would have thought that the opinions of court and Commission would have made unmistakably clear that it is not every advertisement carrying a controversial message which calls for response through a similar spot announcement format. 16/ The emphasis, quite to the contrary, was on the uniquely serious and well-documented hazards to the public health inherent in cigarette smoking – hazards deeply explored and extensively expounded upon by the other branches of government – which stood at the core of the Banzhaf ruling.

Nor can we accept the dissenting Commissioner's view. He argues that because of the possibilities of grave physical injury and death associated with service in Vietnam, military recruitment ads raise issues equally as significantly related to the general public health as do cigarette commercials and therefore require similar treatment under the fairness doctrine. Such reasoning overlooks, we think, the crucial point that the fairness doctrine's goal is the "promotion of informed decision-making by the public." 17/ "It is the right of the public to receive suitable access to. . .

16/ Nor may Retail Store Employees Union v. FCC, ____ US App DC ____, 436 F2d 248 [20 RR 2d 2005] (1970) be relied on as support for so broad an interpretation of Banzhaf. The fairness doctrine issue arose there in the context of a license renewal proceeding in which a labor union challenged the licensee's refusal to air announcements urging listeners to boycott a department store. The management of the store, with whom the union was locked in a protracted labor dispute, had been regularly presenting advertisements requesting the public to patronize its store. In remanding the case, the court instructed the Commission to take into account, as an aspect of the "public interest," the congressional policy "favoring the equalization of economic bargaining power between workers and their employers." Id at 259. Nowhere in the court's discussion of the applicable statutory standard (Id. at 256-59) can be found any indication that the broad discretion generally accorded to licensees in meeting their obligation to present opposing views on controversial issues has been replaced by a rule requiring response in kind in all commercial advertising cases.

17/ Retail Store Employees Union v. FCC, supra at 257.

ideas and experiences which is crucial here," 18/ rather than the desire of those who espouse competing views to express their opinions no matter how fully the same subject matter is covered in the licensee's programming or is patently apparent to the public.

Other cases presently pending or yet to be brought before this court will provide the appropriate occasions for critically tracing the contours of the public interest standard as it applies to commercial advertising. 19/ It is sufficient for the resolution of all contentions raised in the proceedings immediately before us to recognize that, whatever the logical sweep of the existing ruling as to cigarettes, these arguments reach far beyond the contemplation of either the court's or the Commission's ruling that a fair response to cigarette advertising in the name of the general public health was in the public interest.

For the reasons stated, we decline to reverse the ruling of the Federal Communications Commission rejecting the complaint by both groups of petitioners under the fairness doctrine.

18/ Red Lion Broadcasting Co. v. FCC, 395 US 367, 390 [16 RR 2d 2029] (1969).

19/ The case which the FCC recognizes as the most direct challenge to its cigarette ruling to date – the air pollution issues raised by automobile and gasoline advertising in New York City – is presently pending before this court. Friends of the Earth v. FCC, No. 24,556 (argued 10 June 1971). For the Commission's ruling in this case see 24 FCC 2d 743 [19 RR 2d 994] (1970).

We also note the Commission's recent announcement that it is preparing to institute proceedings "to consider every facet of the Fairness Doctrine and related public interest policies." FCC News Release, Report No. 9876, at 3 (14 May 1971). Such an investigation at the agency level should provide a helpful and much-needed illumination of the commercial advertising aspects of the fairness doctrine.

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FRIENDS OF THE EARTH v. FCC

FRIENDS OF THE EARTH and GARY A. SOUCIE v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES

CITIZENS FOR CLEAN AIR, INC., NATIONAL B/CASTING CO., INC. Intervenors

U.S. Court of Appeals, District of Columbia Circuit, August 16, 1971

No. 24,556

[¶10:315(G)(1), ¶10:315(G)(2)] Fairness doctrine – product advertising.

The Commission erred in refusing to extend to high-test gasoline and high-power automobile commercials its ruling with respect to cigarette commercials. The distinction made by the Commission that, because cigarettes are unique in the threat they present to human health, the public interest considerations which caused it to reach the result it did in the cigarette case have no force in the present case, is not apparent. Neither is the court impressed by the assertion that, because no governmental agency has yet urged the complete abandonment of the use of automobiles, the commercials do not touch on a controversial issue of public importance. Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway. ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence, as here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, the parallel with cigarette advertising is exact. The case is remanded to the Commission to determine whether the fairness doctrine was satisfied by the licensee which broadcast the commericals, possibly through the medium of other programs. Friends of the Earth v. FCC, 22 RR 2d 2145 [US App DC, 1971].

Petition for Review of Order of the Federal Communications Commission [19 RR 2d 994]

Mr. Geoffrey Cowan, with whom Messrs. Victor H. Kramer and James W. Moorman were on the brief, for petitioners.

Mr. Richard E. Wiley, General Counsel, Federal Communications Commission, with whom Messrs. Daniel R. Ohlbaum, Deputy General Counsel, and Edward J. Kuhlmann, Counsel, Federal Communications Commission, were on the brief, for respondents. Mr. John H. Conlin, Associate General

Counsel, Federal Communications Commission, and Mr. Howard E. Shapiro, Attorney, Department of Justice, also entered appearances for respondents.

Mr. Lawrence J. McKay for intervenor National Broadcasting Company. Messrs. Donald J. Mulvihill, Mathias E. Mone, Howard Monderer and Roy L. Regozin were on the brief for intervenor, National Broadcasting Company.

Mr. Roger C. Wolf was on the brief for intervenor Citizens For Clean Air, Inc.

Mr. Jerome Congress filed a brief on behalf of the New York City Environmental Protection Administration, as amicus curiae.

Before Wilbur K. Miller, Senior Circuit Judge, McGowan and Robb, Circuit Judges.

McGowan, Circuit Judge: Petitioners in this statutory review proceeding attack the dismissal by the Federal Communications Commission, without hearing or oral argument, of their fairness doctrine complaint in respect of Station WNBC-TV in New York City. The issue raised is that of the reach of the fairness doctrine in relation to product advertising, in this instance automobile and gasoline commercials. For the reasons hereinafter appearing, we think that the Commission erred in concluding that the advertising in question did not present a point of view favorable to one side of a controversial issue of public importance; and we remand for reconsideration and further inquiry by the Commission to determine whether the licensee has been adequately discharging its public service obligations by carrying a reasonable amount of information on the other side of the question, or whether it must take further positive actions, differing in either kind or degree from what it has been doing, in order to achieve the balance contemplated by the fairness doctrine.

I

On February 6, 1970, petitioners 1/ wrote a letter to WNBC-TV, complaining of the "spot advertisements for automobile and gasoline companies [which] constantly bombard the New York area viewers with pitches for large-engine and high-test gasolines which are generally described as efficient, clean, socially responsible, and automotively necessary." Petitioners referred to the following commercials as having been selected at random in the weeks immediately preceding their letter:

(1) January 26, 1970, 8:15 p.m., 30 sec., an advertisement for Ford Mustang, picturing the car on a lonely beach, and stressing its "performance" (large engine displacement);

(2) Same date, 8:45 p.m., 30 sec., an advertisement for Ford Torino stressing size;

1/ The individual petitioner is a resident of New York City who serves as executive director of Friends of the Earth, the other petitioner herein. The latter is a national organization dedicated to the protection and preservation of the environment. Its headquarters are in New York City.

(3) January 22, 1970, 6:51 p.m., 30 sec., an advertisement for Chevrolet Impala stressing the great value of its size ("you don't have to be a big spender to be a big rider"), including the standard 250-horsepower V-8 engine;

(4) January 5, 1970, 8:05 p.m., 30 sec., an advertisement for Ford Mustang and Torino GT, again stressing size ("4-barrel, V-8" and "up to 429 cubic inches") and advocating "moving up to" a larger car;

(5) December 10, 1969, 11:15 p.m., encouraging the use of high-test leaded gasoline for cold-weather starting ("the cold-weather gasoline").

Petitioners asserted, contrarily, that these products were especially heavy contributors to air pollution, which had become peculiarly oppressive and dangerous in New York City; and that they fell within the reach of the decisions of the Commission and of this court on cigarette advertising. Banzhaf v. FCC, 132 US App DC 14, 405 F2d 1082 [14 RR 2d 2061] (1968), cert denied sub nom., Tobacco Institute v. FCC, 396 US 842 (1969). Petitioners noted that, just as the Commission in the case of cigarette advertising relied heavily upon the report of the Surgeon General's Advisory Committee, so had the Surgeon General, in his 1962 report on "Motor Vehicles, Air Pollution and Health," concluded that automobile emissions offer significant dangers to human health and survival – a conclusion reiterated by a more recent report issued by the National Academy of Science and the National Academy of Engineering. Reference was also made to the 1969 report of Mayor Lindsay's Task Force on Air Pollution, which said that "[T]he best way to cut down on dangerous hydrocarbons in the air is to cut down on horsepower."

Thus, so it was said, the treatment by the communications media of the relationship of air pollution to automobiles occurs in the context of a public controversy in which government officials and professional and lay people concerned about health are pitted against the automobile manufacturers and the oil companies, and presents a situation to which the fairness doctrine applies. 2/ Petitioners asked that the licensee "promptly make known the ways in which it intends to discharge its responsibility to inform the public of the other side of this critical controversy;" and, although asserting financial inability to purchase time, offered to produce and make available to the licensee spot advertisements presenting the anti-auto-pollution case. Petitioners indicated that, if a satisfactory response was not forthcoming, complaint would be made to the Commission.

On February 18, the licensee replied. It took the position that the Commission's tobacco decision was limited by its terms to cigarette advertising, and that it did not, in the Commission's words in that decision, impose any

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2/ The origins and nature of the fairness doctrine are comprehensively described in Red Lion Broadcasting Co., Inc. v. FCC, 395 US 367 [16 RR 2d 2029] (1969), especially at pp. 375-386.

fairness doctrine obligation "with respect to other product advertising." Further, said the licensee, there is no real controversy about whether transportation by automobile should continue and that, therefore, the advertising of automobiles and of the fuels which propel them is not related to any controversial issue of public importance. Finally, the licensee referred to a number of programs presented by it in which the problem of air pollution by automobiles had been discussed; and it suggested that this represented an adequate discharge of any public interest obligation it had to inform its viewers on this subject.

On March 14 petitioners wrote a letter to the Commission, attaching the foregoing exchange of correspondence with the licensee and lodging a formal complaint against WNBC-TV "for failure to fulfill its 'fairness doctrine' and 'public interest' obligations with respect to automobile and gasoline advertisements." Petitioners urged upon the Commission the applicability of its cigarette advertising decision to other health hazards, and to the increasing recognition by governmental and other experts that carbon monoxide pollution caused by automobiles had become a serious and substantial danger to health, particularly in New York City. They reasserted their contentions that the large-car and highpowered gasoline advertisements carried by the licensee were designed to promote the idea that these products presented no health hazards in fact. They also contended that the discussion programs cited by the licensee were no adequate offset to the many spot commercials which were aired repeatedly throughout the broadcast hours, including the times of maximum viewing. It was the petitioners' request of the Commission that "this complaint be investigated and that necessary and appropriate action be taken to bring WNBC-TV into compliance with the requirements of the Federal Communications Act."

This letter of complaint was supplemented on April 7 by a letter to the Commission from counsel for the petitioners in which the Commission's attention was drawn to the recently enacted National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat 852. Counsel pointed out that in this new statute Congress had emphasized the "critical importance of restoring and maintaining environmental quality," and had authorized and directed government agencies to advance these ends and to interpret and administer "the policies, regulations, and public laws of the United States. . . in accordance with the policies set forth in this Act." Counsel referred to the underlying report of the Senate Committee which indicated that this mandate was intended to extend to "the licensing functions of independent agencies as well as the ongoing activities of regular Federal agencies." S Rep No 91-296, 91st Cong, 1st Sess 14 (1969).

On June 20 the Environmental Protection Administration of the City of New York addressed a letter to the Commission in support of the petitioners' complaint. It described air pollution conditions in New York City, and asserted that they were presenting an increasingly serious danger to health. A similar supporting letter was sent to the Commission by Citizens For Clean Air, Inc., a New York membership corporation organized for the purpose of educating the citizens of the New York metropolitan area in the hazards of air pollution and the effective means of alleviating it. It pointed out that, although serious suggestions were currently being made for the prohibition of automobiles in Manhattan, the commercials in question were urging the use of cars of ever larger horsepower, thereby compounding the problem. This letter urged that the Commission conduct hearings "for the purpose of developing facts adequate to resolve the serious questions which have been raised"; and it indicated a wish to present testimony in any such hearings.

On June 13 the licensee wrote a letter to the Commission in which it reiterated its contention that the content of the commercials complained of did not constitute a discussion of the pollution issue. It also listed by title a number of programs carried by it which it characterized as a more than adequate discharge by it of any duty it may have had to inform the public of the anti-pollution viewpoint.

Counsel for the petitioners responded to this letter on June 30 in a letter which, among other things, described the ever-growing health hazard in New York City by reason of automobile-produced air pollution and challenged the claim by the licensee that its public service programs adequately countered the effect of the automobile and gasoline spot advertisements complained of. It asked the Commission to examine actual transcripts of the programs cited by the licensee as fulfilling its public interest obligations, and asserted that such an examination would demonstrate that a substantial gap remained in the licensee's presentation of the conflicting positions with respect to automotive pollution of the air. 3/

In a letter to petitioners dated August 5, 1970, the Commission reviewed the contentions made in the foregoing correspondence and reported its conclusion that "no action is warranted against WNBC." It recognized that automobiles "result in man, deaths each year and because their gasoline engines constitute the main source of air pollution (S Rep No 91-745, 91st Cong, 2d Sess 3 (1970)), they raise most serious environmental problems." This was, however, said to be true of "a host of other products or services – detergents (particularly with phosphates), gasoline (especially of a leaded nature), electric power, airplanes, disposable containers, etc." Cigarettes, said the Commission, are distinguishable from products of this nature, since smoking them is a habit "which can fade away" without impact upon other aspects of life, and which official voices have urged the public to avoid or to abandon. Contrarily, the Government is not urging discontinuance of the use of automobiles, although it is beginning to recognize that far-reaching action must be taken to accommodate the impact of automobiles upon the environment. The Commission asserted that the focus should probably be on such action and "not [on] the peripheral advertising aspect."

The Commission represented itself as being without power to take the kind of action which could solve or alleviate the air pollution problems caused by the use of automobiles. That was a matter about which it was not expert, and which falls within the competence of other agencies of the Government. The Commission also stated that there was a threshold issue as to whether the commercials complained of did in fact present one side of a controversial issue. It purported not to have the information available to exercise judgment on the question of whether the differences in the amount of time respectively involved in the advertising of large and small cars is sufficiently great to call for further time to be afforded to the side taken by petitioners. "We have,"

3/ Petitioners professed difficulty in seeing how "The World of the Beaver" and "The Great Barrier Reef" programs, cited by the licensee, had much relevance to the problem of the pollution of the air in New York City by automobiles.

said the Commission, "no such information before us, but we decline in any event to extend the cigarette advertising ruling to these other products." It stated its belief to be that "we should adhere to our previous judgment that cigarettes are a unique product permitting the simplistic approach adopted in that field."

The Commission went on to say that, even if it be assumed to be wrong in that belief, it would not extend the cigarette ruling "generally to the field of product advertising." To do so would, said the Commission, "undermine the present system which is based on product commercials, many of which have some adverse ecological effects." It justified this conclusion by pointing to the fact that a licensee had a public interest obligation to provide discussions of the environmental issues affected by some of the advertised products, although it did not address itself to the content and volume of the programs relied upon by the licensee as discharging their obligations or make any findings in this regard. It thought that the approach of regulating product advertising is one which Congress could take, but, in the absence of action by Congress, the Commission should stay its hand.

II

In this court the Commission asserted that "[T]he crucial issue in this case is whether the Commission reasonably refused to extend to gasoline and automobile commercials its ruling with respect to cigarette commercials." We have no difficulty in accepting this formulation of the issue, involving as it does a comparison of the record before us with that before the Commission and this court in Banzhaf.

The complainant in Banzhaf brought to the Commission's attention certain specific commercials which allegedly sought "to create the impression and present the point of view that cigarette smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life." It was urged upon the Commission that such commercials took one side of a controversial issue of public importance, and that, under the fairness doctrine, the licensee was required affirmatively to make its facilities available for contrasting viewpoints. The licensee in Banzhaf represented that it had in fact broadcast a number of news and information programs about the impact of smoking upon health, and had carried some public service announcements of the American Cancer Society free of charge. Thus, said the licensee, its coverage of the health aspects of smoking had actually been in full compliance with the fairness doctrine, although it went on to insist that the fairness doctrine had no application to product advertising.

The Commission accepted the complainant's characterization of the cigarette commercials in question as presenting a distinct point of view on a controversial matter of public importance; and it regarded this as bringing the fairness doctrine into operation. The Commission did not require the licensee to provide a precisely equal amount of time for the anti-smoking position, and it left this matter of time and the type of programming to the good faith judgment of the licensee. It did, however, expressly direct licensees carrying cigarette commercials to provide "a significant amount of time for the other viewpoint." The vigorous challenge made in this court to the Commission's ruling did not prevail, and we upheld the Commission's action as against the many-faceted attack mounted against it in the tobacco case.

FRIENDS OF THE EARTH v. FCC

Petitioners' letter of complaint to the Commission in the case presently before us called attention to certain commercials of the licensee which allegedly suggested that there were special virtues in cars of greater rather than lesser horsepower, and in gasolines of the high-test, leaded character. As the petitioners said in concluding their letter to the licensee, all of these advertisements, in a manner reminiscent of the themes sounded in the cigarette advertisements, "imply that the good life is somehow inexorably connected with the use of powerful cars and high-test gasoline." For this reason, it was said, these particular commercials reflected a point of view on the merits of the use of larger cars and more powerful fuels which, in the context of the current concern about the danger of air pollution to health, invoked the fairness doctrine.

No more than in Banzhaf did the Commission here deny the existence or the persuasiveness of expert evidence from both official and private quarters, of the very real dangers to health presented by air pollution, and the significant degree to which automobile emissions both create and aggravate the air pollution problem. To this point, therefore, the pattern of the problem unfolding before the Commission and its response to it are very like that in Banzhaf. Where the Commission departs from Banzhaf is in insisting that, because cigarettes are unique in the threat they present to human health, the public interest considerations which caused it to reach the result it did in Banzhaf have no force here.

The distinction is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger. Neither are we impressed by the Commission's assertion that, because no governmental agency has as yet urged the complete abandonment of the use of automobiles, the commercials in question do not touch upon a controversial issue of public importance. Matters of degree arise in environmental control, as in other areas of legal regulation. To say that all automobiles pollute the atmosphere is not to say that some do not pollute more than others. Voices have already been lifted against the fetish of unnecessary horsepower; and some gasoline refiners have begun to make a virtue of necessity by extolling their non-leaded, less dynamic, brands of gasoline. Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only have become controversial but involves an issue of public importance. When there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance of Banzhaf inescapable.

In its Banzhaf ruling the Commission was at great pains to warn that it did not contemplate its extension to product advertising generally; and the Commission's action now under review reflects, more than anything else, a purpose to make good on that representation. But the Commission has since been obliged to moderate its view that commercial advertising, apart from cigarettes, is immune from the fairness doctrine. On May 12 last it issued its ruling (FCC 71-526) [21 RR 2d 1097] in the so-called Chevron case where complaint had been made of gasoline commercials which allegedly made deceptive and misleading claims with respect to the product's capacity to minimize air pollution.

The Commission decided to take no action in Chevron because (1) the commercials there in question, far from suggesting that automobile emissions do not contribute significantly to the dangers of air pollution, urged that the gasoline being advertised was designed to reduce those dangers, and (2) the commercials were the subject of a pending Federal Trade Commission proceeding on a charge of false and deceptive advertising. In this context the Commission did not think that the purposes of the fairness doctrine were served by making it the occasion for a debate with respect to the efficacy of a commercial product. Of the applicability of the doctrine generally, however, the Commission said:

> "This is not to say that a product commercial cannot argue a controversial issue raising fairness responsibilities. For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play."

On June 30 last, the Commission in the so-called Esso case (FCC 71-704) [22 RR 2d 407] sustained a fairness doctrine complaint which it thought to come within the range of these examples. Complaint had been made about commercials sponsored by Standard Oil Company of New Jersey which related to the development of oil reserves in Alaska, and which were said "to discuss one side of controversial issues of public importance, namely (1) the need of developing Alaskan oil reserves quickly and (2) the capability of the oil companies to develop and transport that oil without environmental damage." The licensee took the position that the commercials in question were institutional advertising which did not involve any controversial issue of public importance. The Commission held that this approach was unreasonable, and that the fairness doctrine was triggered by the commercials in issue.

Having decided that the fairness doctrine applied, the Commission then turned in Esso to the claim by the licensee that other programs carried by it were fully adequate to present the contrary side of the question. The Commission concluded that, on the basis of the information before it, it could not find that the programs cited by the licensee "afforded reasonable opportunity for the presentation of contrasting views to those presented in the commercials. . . ." The licensee was, accordingly, directed to submit within 10 days a statement indicating what additional material it had, or intended to, broadcast in order to satisfy its obligations under the fairness doctrine.

It is obvious that the Commission is faced with great difficulties in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine. It has said as much in the closing paragraphs of the Chevron decision, where it announced its purpose to initiate in the near future a wide ranging inquiry which "will permit a thorough re-examination and re-thinking of the broader issues suggested by this and other recent cases before us. . . ." We do not, of course, anticipate what the result of that proceeding will prove to be, nor do we minimize either the seriousness or the thorny nature of the problems to be explored therein. Pending, however, a reformulation of its

position, we are unable to see how the Commission can plausibly differentiate the case presently before us from Banzhaf insofar as the applicability of the fairness doctrine is concerned.

It is true that fairness doctrine obligations can be met by public service programs which do not give reasonable vent to points of view contrary to those reflected in the offending commercials. The Commission recognized this principle in the decision now under review, and noted that the licensee had listed programs carried by it as allegedly discharging this responsibility. The Commission, however, explicitly restricted the basis of its ruling to the inapplicability of the fairness doctrine; and it did not regard as being before it for decision the question of whether the licensee had otherwise met its fairness obligations. It indicated that this was a matter which was properly to be explored at license renewal time.

The fairness doctrine does not, of course, operate on that kind of a time schedule, as the Commission's most recent decision in the Esso case demonstrates. There, once the Commission found the fairness doctrine to be applicable, it directed its attention to the question of whether compliance had in effect been forthcoming by virtue of other programs aired by the licensee. Since the information before it on this point was scanty, the Commission was compelled to find the programs cited as falling short of an adequate presentation of contrasting views. It did, however, give the licensee an opportunity within 10 days to submit further information on this score.

The disposition we make here follows the Esso approach. Having found this case indistinguishable from Banzhaf in the reach of the fairness doctrine, and being without the benefit of an express finding by the Commission on the question of the possible satisfaction of that doctrine by the licensee through the medium of other programs, we remand the case to the Commission for determination by it of this second issue. 4/

It is so ordered.

Wilbur K. Miller, Senior Circuit Judge, would affirm.

4/ In Green v. FCC and Pizzo v. FCC [22 RR 2d 2022] (Nos. 24,470 and 24,516, decided June 18, 1971), this court left undisturbed the Commission's disallowance of a fairness doctrine complaint about military recruitment advertisements. There, however, the petitioners persisted in linking their complaints about the advertisements to the controversial issues of the Vietnam War and the draft; and the Commission found expressly that the licensees had not "failed to treat the issues of Vietnam and the draft (both concededly controversial issues of public importance) in conformance with the fairness doctrine."

You assert that you were not aware that one of Mr. Spurling's opponents had participated in the talk program and that, in any event, the opponent was not identified to listeners. Mr. Spurling does not claim that the opponent was identified. You state that you regret "that he [Mr. Spurling] was not afforded the opportunity to" appear on the program and that steps have been taken "to insure that in the future a situation of this type will not reoccur." The Commission has held that the determination of whether a candidate is "identified" for the purposes of Section 315 "is a matter for the licensee's good faith judgment." (In re Station WBAX, 17 FCC 2d 316 (1969).) The facts are in dispute as to how near the end of the talk program Mr. Spurling called. The licensee states it was two minutes before the end of the program; Mr. Spurling states he was held on the line for eight minutes. Mr. Spurling does not claim that he stated to station personnel during his call who the previous caller was, but asserts that station personnel knew the caller's identity. It is also not clear whether in his call Mr. Spurling made a request for "equal opportunity" in response to the previous caller.

In view of all of the circumstances and the fact that it has not been established that the audience knew the identity of the candidate who called earlier, we cannot find that the licensee violated the statute in this instance.

In sum, we conclude that with respect to the first incident set forth above, the licensee acted unreasonably. We note again that the second incident raises serious questions concerning Section 315 and calls for the rule making action indicated.

This correspondence will be placed in the licensee's file for future consideration as part of the licensee's overall performance.

Commissioners Robert E. Lee and Houser absent.

FCC 71-704
63804

NATIONAL B/CASTING CO.)
New York, New York)

June 30, 1971

[¶10:315(G)(1), ¶10:315(G)(2)] Fairness doctrine – commercial advertisements.

Advertisements broadcast by an oil company, relating to the development and transportation of Alaskan oil, constituted discussion of one side of a controversial issue of public importance. The advertisements raised issue concerning the need for developing the oil reserves in Alaska at this time and the ecological effects which may ensue. The advertisements also inherently raised the controversial issue of the ecological effects which may result from transporting such oil, since the company's large investment in drilling for Alaskan oil quite

obviously is based on the assumption that transportation of the oil to other parts of the world will be permitted. Programs presented by the network did not afford reasonable opportunity for the presentation of contrasting views. National B/casting Co., 22 RR 2d 407 [1971].

As you know, a complaint was filed by James W. Moorman and Geoffrey Cowan on behalf of the Wilderness Society and Friends of the Earth alleging you failed to fulfill fairness doctrine and public interest obligations regarding advertisements sponsored by The Standard Oil Company of New Jersey (ESSO) and broadcast by your network and your owned and operated stations.

Complainants have submitted the following transcripts of advertisements:

I. "Here on the North Slope of Alaska it takes 30 days to erect an oil rig, compared with a few days in Texas. Roads scarcely exist. In winter when sea lanes are choked with ice, all equipment must be flown in. The freignt bill for the first North Slope wells was nearly a million dollars, with no guarantee of finding oil. Is it worth the risk? We at Jersey think so, both for us and for you. The Alaskan oil strikes are big, but so is America's need for energy. At the rate this country is now using oil, the Alaskan strikes probably represent little more than three years supply. If America's energy supply is to be assured in this unpredictable world the search for domestic oil must go on and fast."

II. "This is the Canadian Arctic near Alaska. In Winter temperatures plunge to sixty below and it freezes solid. But in Summer it's a gentle land. Jersey's Canadian affiliate, Imperial Oil, made its first discovery in the Arctic fifty years ago. Experience since then has shown them not only how to look for oil in the far North, but to look for ways to preserve the ecology. To protect the swans and geese and ducks that return each year to nest and raise their young. And to avoid disturbing the migration and grazing habits of reindeer, caribou and other wildlife. By balancing demands of energy with the needs of nature they're making sure that when wells are drilled or pipelines built, the life that comes back each year will have a home to come back to."

III. "The Arctic wildnerness is not always frozen. In summer much of it comes alive.

Delicate vegitation called Tundra blooms. Reindeer, caribou and other animals graze on it.

Jersey's affiliate, Humble Oil, is exploring and drilling for oil in the Arctic. In constructing roads and living quarters they can't avoid disturbing some of the Tundra and if it isn't replanted it can turn into a permanent sea of mud.

So back in 1968 Humble joined a research project on the North slope of Alaska. Seeds of thirteen varieties of hearty winter grass were gathered and planted. Four types survived the bitter Arctic winter, some growing even faster than the Tundra itself.

> Now we believe we know how to restore disturbed Tundra to help create a better balance between the need for oil and the needs of nature."

Complainants allege that these advertisements discuss one side of controversial issues of public importance, namely (1) the need of developing Alaskan oil reserves quickly and (2) the capability of the oil companies to develop and transport that oil without environmental damage. Complainants state the advertisements "directly address the controversial questions related to construction of the pipeline and a road which are before the courts, the Executive Branch, and the public." Complainants state that these advertisements were broadcast during the program "Meet the Press" which "is watched by an especially large number of decision-makers and people concerned with public affairs. . . ." Complainants state these commercials "are not general product advertisements, nor are their messages indirect." Complainants contend, "Any environmental issues which are raised in the advertisements are treated superficially and from only one viewpoint – i.e., that the oil is sorely needed and that there will be no environmental harm."

In your responses to the complainants and the Commission you state that (1) you do not accept commercial material discussing controversial issues of public importance; (2) the advertisements are "institutional advertising, seeking to create good will for the corporation as a whole and the general conduct of its enterprise"; (3) "the investment of oil industry resources in searching out presently unknown domestic deposits of oil is [not] a controversial issue of public importance at this time, and this, not the pros or cons of the Alaskan pipeline, is the message of the first advertisement"; (4) the second advertisement "deals with the experience of Imperial Oil, Jersey's Canadian affiliate, during the past 50 years since its first discovery of oil in the Canadian Arctic, near Alaska" and its concern for ecology; (5) the second advertisement contains a passing reference to "pipelines" which does not refer to the Alaskan pipeline and does not constitute the advocacy of one point of view; and (6) the Friends of the Earth ruling is applicable. You state that you have fairly covered the issue of the Alaskan pipeline in programs which included the June 28, 1970, broadcast of "In Which We Live"; the February 14, 1971, "Meet the Press" program; and reports on the "NBC Nightly News" of February 16, 24, and 28, 1971.

In rebuttal complainants contend that your statement that "[n]either advertisement refers to the Alaskan pipeline not to any proposed legislation concerning it" indicates NBC "totally failed to understand the substance of our complaint or the two fundamental disputed issues involved in the controversy over the trans-Alaskan pipeline," i.e., legislation has never been contemplated by any of the parties involved. Additionally complainants state that while the "ESSO advertisements were running on television, the Alyeska corporation, which plans to build the pipeline and of which Standard Oil of New Jersey is one of seven oil corporation members, was itself running advertisements in newspapers and magazines throughout the country urging that the pipeline be built."

Complainants also submit a copy of an ESSO advertisement from Harpers Magazine, May 1971, in which the following paragraph appeared in the midst of language substantially similar to that contained in the first commercial:

"Following the discovery of oil on the Slope, we faced the problem of how to get the oil out of Alaska with a minimum disturbance of the Arctic environment. The solution is the most carefully engineered and constructed crude oil pipeline in the world. Until it is built, profits will wait."

Complainants state that this advertisement indicates that ESSO admits the inter-relationship of the issues raised by complainants and the construction of the Alaskan pipeline.

Complainants state that institutional-type advertising may present one side of a controversial issue of public importance and is not immune from the fairness doctrine because it also creates good will for the advertiser. Regarding the programs which you cite as fulfilling your fairness doctrine obligations in this matter, the complainants state the coverage was inadequate and weighted in favor of those supporting the pipeline's construction. With reference to the specific broadcasts cited by you, complainants state:

"1. In Which We Live, June 28, 1970, - Complainants submit that the broadcast of 'In Which We Live' on June 28, 1970, is to be accorded little weight in determining whether NBC has an obligation under the fairness doctrine for advertisements broadcast from November 1970 until April 1971.

2. Meet The Press, February 17, 1971, - The 'Meet the Press' program of February 14 cannot be said to constitute 'programming on the issue'. The text of the relevant portion of that program is attached and hereby made a formal part of this addendum to the complaint. It is inconceivable that NBC could believe, in good faith, that Mr. Train's nine equivocal sentences on the proposed trans-Alaska pipeline do anything to meaningfully present any side of the questions at issue in the dispute over whether to build the pipeline.

3. NBC Nightly News, February 16, 1971, - The NBC Nightly News of February 16 featured coverage of the Washington D.C. hearings on the proposed Trans-Alaska pipeline. The purpose of the hearings was explained by Secretary of the Interior, Rogers C.B. Morton and testimony strongly in favor of the plan was given by William Egan, Governor of Alaska.

4. NBC Nightly News, February 24, 1971, - The NBC Nightly News of February 24 featured a report by Don Oliver from Inuvik, Alaska. This report was balanced in its eight sentence presentation of the views of the oil companies and conservationists.

5. NBC Nightly News, February 28, 1971, - The NBC Nightly News of February 28 focused on the hearings in Anchorage, Alaska, which were summarized by the statement that 'there is little opposition to the project in Alaska,' a statement which complainants contend is untrue."

Complainants, to support their contention that prompt Commission action is necessary, cite a June 1 Wall Street Journal article which reported that Interior Secretary Rogers C.B. Morton promised to make a decision regarding land use permits for the trans-Alaska pipeline by "about July 15."

The first question to be decided is whether the fairness doctrine applies to the advertisements cited in the complaint. In several recent cases including Letter to Friends of the Earth, 24 FCC 2d 743 [19 RR 2d 994] (1970), and NBC et al., (Chevron Decision) FCC 71-526 (Mimeo No. 63075) [21 RR 2d 1097], dated May 12, 1971, we declined to extend the fairness doctrine to general product advertisements such as those making claims regarding a product's efficacy or social utility. However, in footnote 6 of the Chevron decision we stated:

> "This is not to say that a product commercial cannot argue a controversial issue raising fairness responsibilities. For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play."

We have reviewed a transcript of the advertisements submitted by complainants, the contents of which are not challenged by you. We believe that these commercials are similar to the similar to the examples cited in footnote 6 and constitute the discussion of one side of a controversial issue of public importance. 1/

In the light of the present public controversy over the desirability of developing and transporting Alaskan oil, we are not persuaded by your argument that the advertisements are merely "institutional advertising," or that a discussion of an oil company's search for oil and its asserted concern for ecology are not controversial issues of public importance. The quoted advertisements appear to raise issues concerning (i) the need for developing the oil reserves in Alaska at this time and (ii) the ecological effects which may ensue from such development. In our opinion, the advertisements also inherently raise the controversial issue of the ecological effects which may result from transporting such oil, since the company's large investment in drilling for Alaskan oil quite obviously is based upon the assumption that transportation of the oil to other parts of the world will be permitted. It appears, therefore, that your determination that such advertisements did not raise fairness doctrine obligations was unreasonable.

We now must decide whether you have complied with the requirements of the fairness doctrine. We note the programs which you cited as presenting the complainants' viewpoints on the Alaskan pipeline issue, as well as the

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1/ Although commercial II is nominally addressed to the Canadian Arctic, in the context of the present dispute it advances a viewpoint on the development and transportation of oil in the North American Arctic generally.

complainants' assertion that those broadcasts did not afford reasonable opportunity for the presentation of views in contrast to those advanced in the commercial announcements. We also note that you did not attempt to rebut any of the complainants' specific statements regarding the content of the cited programs. On the basis of the information before us, we cannot find the programs cited by you afforded reasonable opportunity for the presentation of contrasting views to those presented in the commercials, e.g., the possible adverse ecological and environmental effects and the possibility of obtaining oil elsewhere.

Therefore you are requested to submit within ten days a statement indicating what additional material you have broadcast or intend to broadcast in the near future which will afford opportunity for presentation of views contrasting with those raised in the commercials concerning the need to develop Alaskan oil reserves and the ability of oil companies to develop and transport oil without environmental damage.

Commissioner Robert E. Lee absent.

FCC 71R-210
69835

In re Applications of	)	
	)	
PLEASANT B/CASTING CO.	)	Docket No. 18594
Mt. Pleasant, Iowa	)	File No. BP-17235
	)	
Donald K. Van Slyke, Vern McDonough, James J. Delmont, Alfred R. Sundberg, Dwight C. Vrendenburg, Marion M. Coons, Virgil Meyer, Robert M. Stone, Clarence H. Morton, W.M. Eikenberry, John E. King, Aldo Della Vedova, George R. Garton, and Levorah Keller, dba	)	
CHARITON RADIO CO.	)	Docket No. 18595
Chariton, Iowa	)	File No. BP-17559
	)	
BCST CO. OF IOWA, INC.	)	Docket No. 18596
Mt. Pleasant, Iowa	)	File No. BP-17571
	)	
For Construction Permit	)	

Adopted: July 1, 1971
Released: July 6, 1971

[¶51:301, ¶51:525(A)] Appeal from Examiner's ruling.

Where the Examiner denied a joint petition for approval of an agreement under which applicant A would withdraw from the proceeding, applicant B would be substituted as the applicant for the community

WILDERNESS SOCIETY AND FRIENDS OF THE EARTH

FCC 71-971
66942

In the Matter of)
)
Complaint of)
WILDERNESS SOCIETY and)
FRIENDS of the EARTH against)
NATIONAL B/CASTING CO.)
regarding applicability of fair-)
ness doctrine to commercial)
announcements sponsored by)
Standard Oil of New Jersey (ESSO))

Adopted: September 17, 1971
Released: September 23, 1971

[¶10:315(G)(1), ¶10:315(G)(2)] Applicability of fairness doctrine to advertising.

If any advertisement, product or institutional, deals with one side of a controversial issue, and to the extent it does, the requirements of the fairness doctrine must be met. Licensees need not review other media to divine the intent of the broadcast commercials. Wilderness Society and Friends of the Earth, 22 RR 2d 1023 [1971].

[¶10:315(G)(1), ¶10:315(G)(2)] Fairness doctrine; controversial issue.

Oil company advertisements, although not referring specifically to the Alaska pipeline, referred to oil development in the far North and discussed both the need for rapid development of Alaskan oil deposits and the ecological impacts of such development, and raised fairness obligations. However, a review of programs broadcast by the network involved showed that it had afforded, and was acting to afford, reasonable opportunity for the presentation of contrasting views on the pipeline controversy. Wilderness Society and Friends of the Earth, 22 RR 2d 1023 [1971].

MEMORANDUM OPINION AND ORDER

By the Commission: (Chairman Burch concurring and issuing a statement; Commissioner Johnson concurring in part and dissenting in part and issuing a statement.)

1. Pursuant to §1.106 of the Commission's Rules, NBC has filed a petition for reconsideration of the Commission's June 30, 1971 [22 RR 2d 407], ruling that the broadcast of certain commercial announcements sponsored by the

Standard Oil of New Jersey (ESSO) created fairness doctrine obligations.1/ NBC has also requested oral argument of this case.

Petition for Reconsideration

2. NBC's arguments are as follows:

(1) "The Commission erred in holding the three commercials presented views on controversial issues." NBC states that the public controversy which generated the complaint was whether the trans-Alaska pipeline should be constructed and that "not one word in any of the commercials . . . expressly refers to, much less discusses, the controversial pipeline." NBC, referring to the Commission's statement that the ESSO advertisements ". . . inherently raise controversial issues", states that "[b]y this reasoning any advertisement, institutional or otherwise, may always be held to state a position on a controversial issue." NBC refers to the advertisement run in Harper's Magazine which was submitted by complainants and states that a television station should not be required "to review other media to determine if the supposed intent of a sponsor was to affect particular public policy." NBC also cites Green v. FCC, ____ F2d ____ [22 RR 2d 2022] (DC Cir, 1971) and states "[t]he trans-Alaska pipeline . . . is certainly not more and probably less intertwined with north slope oil exploration and development than enlistment in the army is currently intertwined with the draft and service in Vietnam." NBC contends that the Commission should encourage institutional advertising which states the sponsor's concern for the public and that the effect of the ESSO ruling will be to discourage such presentations. NBC states that if it were required to present views opposed to the trans-Alaska pipeline, it would "deprive the broadcasters of the right to determine the manner in which the public is to be informed on public issues."

(2) "The Commission improperly held NBC had not complied with the fairness doctrine despite the fact that NBC's judgment was made in good faith and was reasonable." Based on the arguments set forth in (1) above, NBC contends that its determination that the advertisements did not raise a controversial issue of public importance was reasonable and that the Commission's decision should be reversed.

(3) "The nature of the Commission's decision, if allowed to stand, will cause great uncertainty to licensees in application of the fairness doctrine and should instead be considered in the forthcoming inquiry proceeding." NBC contends that cases such as ESSO should not be considered on an ad hoc basis but rather as a part of the fairness doctrine inquiry where there would be broad participation and the Commission could take an overall view of the fairness doctrine. 2/

1/ The following pleadings have been filed by the parties with the Commission: Petition for reconsideration filed July 23 by NBC; complainants' response filed July 27; letter from complainants filed August 3; letter from NBC filed August 10; and complainants' response to NBC's August 10 letter filed August 11.

2/ NBC refers to our Notice of Inquiry (Study of Fairness Doctrine), 30 FCC 2d 26 (1971, Docket No. 19260).

(4) "The Commission's findings as to the adequacy of program balance were made prematurely on an incomplete record and is factually erroneous." NBC states that:

> "In reliance on long-standing Commission practice including its decision in Green v. FCC, NBC did not discuss the coverage given in pipeline controversy in its letter to the Commission dated [May 4,] 1971. Following normal procedure in such inquiries, NBC would first have been informed of the staff decision. If adverse, it could then have provided this information which would have been available to the Commission on its review of the matter. The telescoping of the normal multi-step procedures deprived NBC of the opportunity to furnish information about the judgment in question and about its program balance. By the same token the Commission was deprived of an adequate basis for its own determination. The informational gaps were not filled by complainant's description of the programs we cited to them."

Reply of the Wilderness Society and Friends of the Earth

3. Mr. Geoffrey Cowan, on behalf of The Wilderness Society and Friends of the Earth, requests that the Commission deny NBC's petition for reconsideration because it does not present any new considerations of law or policy, and that the Commission find that the programming presented by NBC failed to satisfy its fairness doctrine obligations.

4. Mr. Cowan states that NBC had adequate opportunity to present the Commission with all factual data regarding its programming; that the Commission never suggested that licensees must "police the print media" but that "It is not inappropriate for the Commission to expect licensees, in examining a fairness doctrine request, to take account of such information [newspaper and magazine clippings] when it is specifically called to the licensees attention by complainants"; and that the Commission's ruling regarding the applicability of the fairness doctrine to the advertisement was correct. Mr. Cowan alleges that when NBC's regular programming plus the advertisements are combined, NBC's programming is "heavily weighted in favor of the pipeline." It is also requested that the Commission order NBC to immediately fulfill its fairness obligations with programming that is broadcast on a regular basis, broadcast during time periods likely to reach the viewers of Meet the Press and the Saturday and Sunday Evening News (on which the ESSO announcements were broadcast) and with a format that provides an impact commensurate with the impact of the advertisements.

Discussion

5. We deal first with two preliminary matters. NBC requests that we consider this case as part of our overall fairness inquiry (Docket No. 19260). Certainly the fairness aspects of advertising urgently require comprehensive review, possibly leading to major revision of the fairness doctrine. Thus, while we recently extended the time for filings in this docket, we granted only a 30-day extension with respect to Parts III and IV, those bearing directly on the issues in the present case. See FCC 71-889. We cannot simply call a halt to all ad hoc proceedings until the overall review is completed. We are dealing with claims that go to the public's right to be fairly informed on "matters of great

public concern" (Red Lion Broadcasting Co. v. FCC, 395 US 367 [16 RR 2d 2029] (1969), and both thoroughness and expedition are required. Rather than holding specific fairness complaints in abeyance, we must proceed to resolve them, as best we can, under established policies and law.

6. NBC also asserts that because the Commission failed to follow its "normal procedures," the network was deprived of an opportunity to furnish materials concerning its program balance. This simply was not the case. The Commission addressed a letter of inquiry to NBC on April 19, 1971, and specifically requested that, whether or not NBC believed controversial issues of public importance were involved, it submit an accurate summary of programs that in its view presented significant contrasting viewpoints to those raised in the ESSO commercials. After receiving NBC's response, a member of the Commission's staff asked NBC whether it wished to submit any additional information. NBC said it did not. (Now, on petition for reconsideration, additional information has in fact been provided by the network as to its relevant programming.) We would simply point out that, when the Commission's staff is acting pursuant to delegated authority, it is acting with full authority – and it is not for the licensee to make guesses as to whether the staff or the Commission will rule and, on this basis, hold back pertinent information. The licensee has an affirmative duty to respond, and respond fully, to all proper inquiries.

7. We turn now to the merits of the case, and first to the contention that none of the ESSO commercials specifically discussed the trans-Alaska pipiline and, thus, that the Commission should not have held that NBC acted unreasonably in determining that no controversial issue had been raised. We want to stress that our ruling does not require licensees to review other media to divine the intent of broadcast sponsors. It is based solely on the content of the broadcast commercials, in the context of the ongoing public issues concerning the proposed Alaska pipeline. Nor is our ruling designed in any way to discourage "institutional" as contrasted with "product" advertising. If any advertisement deals with one side of a controversial issue, and to the extent it does, the requirements of the fairness doctrine must be met. The matter is a factual one and, as it is in this instance, one that calls for a difficult balancing of substantial arguments on both sides.

8. We published the texts of the three advertisements in question on p.1. of our June 30 ruling. (a) On advertisement I, NBC argues that it nowhere mentions the pipeline and that its clear thrust is America's urgent need for oil, the consequent need for such difficult oil explorations as that going forward on Alaska's North Slope, and thus that ". . . the search for domestic oil must go on, and fast." We agree that the advertisement does not specifically mention the pipeline. But we also note that germane to the controversy is the question of whether the nation urgently requires development of the North Slope deposits or whether there is room for delay to assess more carefully the alternatives to the proposed pipeline. (See, e.g., pp. 3-4, Moorman letter of February 25, 1971, and p. 21 of the statement attached to that letter.) By its juxtaposition of North Slope deposits and the nation's need for fast oil development, advertisement I does relate to the pipeline issue. (b) As to advertisement II, NBC points out that it mentions the Canadian Arctic and not the Alaska pipeline. Again we agree; indeed, opponents of the Alaska pipeline are now urging consideration of a Canadian pipeline as a better alternative from the ecological perspective. (See, e.g., Moorman statement for EDF, p.8, and p.2 of the EPA statement of March 12, 1971.) On the other hand, we must also note that

the advertisement opens with a reference to ". . . the Canadian Arctic near Alaska" and specifically refers to the ability of Jersey's Canadian affiliate to build a pipeline and ". . . yet preserve the ecology." The "experience" referred to is ". . . in the far North" and thus the discussion does bear on the present Alaska controversy. (c) NBC also presents cogent arguments on advertisement III. This advertisement does not mention the pipeline but simply states that Humble, in exploring and drilling for oil in the Arctic, "can't avoid disturbing some of the Tundra" and, by way of remedy, has developed four types of grass that hold promise of surviving the bitter Arctic winter. The accuracy of this statement is not in dispute. Further, it is obviously desirable that business enterprises take ecological factors into account and that they be encouraged to inform the public of their actions in this regard. Nonetheless, the clear import of this announcement is that ESSO, operating in the far North, can strike a ". . . balance between the need for oil and the needs of nature." And thus it has a cognizable bearing on the controversial issue of the Alaska pipeline.

9. The Green ruling, cited by NBC, is distinguishable from the present case on its facts. In Green, the purpose of the recruitment announcements was to persuade men to join the Armed Services. There was no mention of the Indochina war and no argument, explicit or implicit, that the war was justified. As the court stated, "We consider that . . . military recruitment by voluntary means is all that was implicit in virtually all the Armed Services recruitment announcements." Green v. FCC, supra (Slip Opinion p. 13). In this case, the ESSO advertisements refer to oil development in the far North and discuss both the need for rapid development of oil deposits in Alaska and the ecological impacts of such development. The matter is indeed a difficult one – because we are reviewing the reasonableness of the licensee's judgment and because the pipeline controversy is not specifically referred to – but we adhere to our original finding, in the June 30 ruling, that these advertisements do raise fairness obligations.

10. Thus we arrive at the core issue – whether NBC has afforded "reasonable opportunity for the discussion of conflicting viewpoints. . ." on this matter. See §315(a); Green v. FCC, supra. In resolving this issue, we have stressed in past cases ". . . that we look to all programming that has been presented on the issue." Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 296 [19 RR 2d 1103] (1970). NBC has submitted a list of programs or news items that it states have "presented the views of those for the pipeline, those opposing it, and the various arguments for both points of view." Transcripts, excerpts, or summaries of these programs or news items have now been furnished to the Commission. Further, NBC has shown that it is continuing to inform the American people on this issue by the material that has been presented since the issuance of our June 30 decision. Thus, on July 11 it presented former Secretary of the Interior Udall, a trustee of the complainant's organization, who stated his views on the subject during the Comment program. On August 6 it presented on the Today Show two spokesmen, Senator Randolph and Congressman Dingell, to discuss the pipeline issue. On September 15, it broadcast on the Today Show an eight minute presentation by two anti-pipeline spokesmen, Representatives Aspin and Saylor. We conclude on the basis of this data that NBC has a continuing program to broadcast views on the issue a significant number of times and that, taking into account all the circumstances described above, NBC has thus afforded, and is acting to afford, reasonable opportunity for the presentation of

contrasting views. In short, the American people are not being ". . . left uninformed" on this issue (Green v. FCC, supra, S1 Op p. 12). We stress in this connection that the issue, in the end, is not what this Commission or some other observer might have done but, rather, the reasonableness of the licensee's journalistic judgment. That is the crucial difference between the "equal opportunities" standard of §315 and the much greater leeway necessarily and wisely afforded the licensee under the fairness doctrine.

11. NBC has also requested oral argument. We do not believe there is any such necessity in this case inasmuch as both parties have had full opportunity in their pleadings to make their positions clear.

12. Accordingly, it is ordered, that NBC's petition for reconsideration is denied, to the extent reflected above. In view of the conclusions stated in para. 10, above, no further action is warranted in this case.

CONCURRING STATEMENT BY CHAIRMAN BURCH

I join in the Commission's action in this case. But I do so with such a sense of frustration and disenchantment – reaching to the fundamentals of Commission process – that I believe it is essential to go in much greater detail into both the factual and policy bases of the action. This case ideally points up the ". . . great difficulties [the Commission faces] in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine" (Friends of the Earth v. FCC, Case No. 24,556, CA DC, S1 Op, p. 14 [22 RR 2d 2145]) and, indeed, "difficulties" is a pretty pallid word for it. Bluntly, the situation we fact is a chaotic mess. As the court notes (ibid.), the Commission cannot simply slough off pending matters. It must act. But it is essential to articulate the fundamental problems so that those commenting in our wide-ranging Inquiry in Docket No. 19260 will be sure to focus on them. When I first broached the idea of such an inquiry – the first such proceeding since the 1949 Report on Editorializing (13 FCC 1246 [25 RR 1901]) – in a speech before the N.A.B. in April, I predicted we were heading down a perilous road in fairness matters to "no one knows where". I'll now modify that prediction. We're already there.

The problem, in my judgment, is not the root applicability of the fairness doctrine to the announcements in question. The Commission has affirmed that product commercials can raise fairness obligations and that these commercials do so. I agree. Thus, in our June 30 ruling, we directed NBC to inform us as to what it had done or planned to do to fulfill its fairness obligations – to afford reasonable opportunity for the presentation of the other side of a controversial issue, in the name of full and fair information to the public. In theory, this should be the end of the matter: pulling together of facts, followed by analysis and judgment, followed by appropriate remedy. But the whole thrust of this Concurring Statement is that, in the fairness area, the bond of theory and implementation has come unstuck and all the principal actors – licensees, public interest advocates, the Commission itself – are in limbo, left to fend for themselves.

One difficulty in this case is that NBC has in fact treated the Alaska pipeline issue repeatedly and has presented partisan spokesmen on both sides a significant number of times. Its coverage is a continuing one, as shown by presentations after the submission of the original complaint and after the issuance of our June 30 ruling. (In an Appendix, the pertinent programs are listed.)

An inevitable further question is, "how balanced was the NBC coverage overall?" Thus the problem is posed. For this involves, first, an examination of the scripts to determine whether the material was pro-pipeline, anti-pipeline, or just neutral background. It then involves either counting lines in the scripts or pulling out the stop-watch to estimate the time afforded each side. (Which assumes, of course, that there are only two sides to the issue – and in this as in most such cases, there may in fact be a multiplicity of "sides" many of which may deserve an airing.) In this instance, the Commission judged that NBC has presented fairly balanced coverage, excluding the ESSO announcements, with the best estimate being that its coverage has somewhat favored the anti-pipeline position (roughly 21 against 11 minutes). The core issue is thus whether the ESSO commercials result in an imbalance. If they are counted fully – without any consideration of the countering considerations noted in par. 8 of the majority opinion – the result is roughly a 2-to-1 ratio in time and probably a higher one in frequency, in the range of 4 or 5-to-1. All these figures must also be viewed against the fact that they are constantly changing, in view of NBC's continuing coverage of the issue.

If the matter came within the equal time provision, there is no question but that remedial action would be called for. But that provision is applicable only to broadcasts by candidates. We have also evolved a quasi-equal opportunites approach to political broadcasts generally (see Committee for Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 300 [19 RR 2d 1103] (1970); Letter to Mr. Nicholas Zapple, 23 FCC 2d 707 (1970) and have tended significantly in that direction as to political editorials (see In re Complaint of George E. Cooley, 10 FCC 2d 970 (1967).

A layman would have no difficulty with this case under the popular understanding of the fairness doctrine. He would simply say that fairness means each side gets the same treatment. But the fairness doctrine does not stand for any such simplistic proposition, and wisely so. The purpose of the doctrine is to contribute to an informed citizenry on "matters of great public concern" by promoting "uninhibited, robust, wide-open debate" on broadcast facilities. Red Lion Broadcasting Co. v. FCC, 395 US 367, 394 [16 RR 2d 2029]; The New York Times Co. v. Sullivan, 376 US 254, 270. It would clearly frustrate that purpose if for every controversial item or presentation on a newscast or other broadcast, the licensee had to offer equal time to the other side or sides. See discussion at pp. 291-292, Committee for Fair Broadcasting, supra. The resulting quagmire would, if effect, mean the end of "robust, wide-open" debate. Therefore, the Commission has from the beginning afforded wide discretion to licensees in the manner of fulfilling their fairness obligations. See Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1250-51 [25 RR 1901 (1949); In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 FCC 598, 599 [2 RR 2d 1901] (1964).

The courts have also noted this distinction between the operation of fairness and "equal time". See, e.g., Green v. FCC, Case No. 24,470, CA DC. The latter case is important here because it is the only one that treats this issue head on. The court there stated (Sl Op, p. 10):

> ". . . As to how the conflicting points of review are presented, a licensee can present conflicting views in any fashion, so long as the balance in format, time, protagonists, etc., meets a test of 'reasonableness'." [Footnote quoting Fairness Primer omitted]

To the argument that there was an imbalance in that case, the court asserted (Sl Op, pp. 18-19):

> ". . . We will not attempt to assay here what balance or lack of balance there has existed and does exist in a presentation of the desirable and undesirable features of military life; it is sufficient to point out that under the fairness doctrine it is not necessary that there be an absolute equality in any other criteria for the points of view presented under the fairness doctrine. What the petitioners are apparently confusing with the fairness doctrine is the doctrine of equal time, which has no revelance whatsoever to the issues in this case. Unlike the 'equal opportunities' requirement, which as we have already pointed out deals with legally qualified candidates for public office, the question under the fairness doctrine is one of reasonableness of the station's action, and not whether absolute equality in allocation of time, time of day, or any other criteria, has been achieved."

In affirming the Commission, the court stressed that, "In our view, the essential basis for any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed." (Sl Op, p. 12).

Against this general background, it is also necessary to ask, "what do past Commission precedents tell us about this specific matter?" And I am forced to conclude that the answer, after twenty years of administration of the doctrine, is "virtually nothing". There is one Commission ruling in the cigarette advertising area that a 5-to-1 ratio is not unreasonable. NBC-TV, 16 FCC 2d 956 [15 RR 2d 1065](1969). But like all others in this area, I believe that this ruling is sui generis. And, while I note that the court has not acceded to this position on the general issue (see Friends of the Earth v. FCC, supra.), this aspect was not before the court, and I continue to regard it as inapposite precedent here. I am also told that there was a staff ruling several years back on an urgent fairness matter, and a 3-to-1 time ratio was considered not unreasonable in that case. But, clearly, a single staff ruling cannot be equated with full or proper Commission consideration in so thorny an area.

And I strongly suspect that the issue has not been resolved precisely because it is so thorny. I for one find it impossible to feel very confident or secure about a process that relies on the stop-watch approach – that is, making judgments, and then quantifying the category into which each presentation falls. And this is only the beginning. There are such additional ramifications as the time and style of the various presentations (does a prime-time spot count two times more heavily than a mid-morning interview? three times? or ten times?), the size and make up of the audience, and (as NBC urges in this case) the relative weight that should be accorded an indirect commercial announcement as against the direct rebuttal that would be afforded under a remedial fairness doctrine ruling. And how do we take into account the fact that a broadcaster, like any good journalist, stays with a hot issue until it's resolved – do we simply adopt an arbitrary cut-off? It might even be argued that we have to consider the dial switching habits of the average viewer – which means that only rarely does he recall where he viewed which side of what controversial issue! The road here could lead to a series of decisions with enough variables and shadings to rival a medieval religious tract.

Without driving the point into the ground, this clearly is poor policy. By contrast, good administrative practice dictates that both licensees and the public should know what the pertinent criteria are and thus be able to make rational forecasts about their courses of action. See Friendly, The Federal Administrative Agencies: the Need for Better Definition of Standards (Harvard Univ. Press, 1962). Absent such clear and understandable criteria, Commission rulings tend to become simple recitations of the variables in each case, and a judgment that the action was reasonable or unreasonable – period. I fear that, under present circumstances, both licensees and the public can only fall back on prayer to divine the Commission's intent.

Additionally, the Commission has consistently and rightly striven to avoid the posture of a super-broadcast journalist. See Hunger in America, 20 FCC 2d 143 [17 RR 2d 674](1969); Democratic National Convention, 16 FCC 2d 650 [15 RR 2d 791](1969). I question whether a process of categorizing and quantifying presentations, times, and formats, in order to rule on the reasonableness of a licensee's judgment, does not involve the Commission too deeply in day-to-day journalistic practices. More important still, I must question whether it is appropriate for an agency of the government, even with the best of good faith, to get so involved.

On the other hand, there is obviously another side to be considered. Suppose a licensee were clearly and patently to devote 100 times more exposure to one side of an issue than to any other side? Or 50 times? Or any other clearly unreasonable disparity? Such a disparity surely could not be said to constitute "reasonable" opportunity, and this agency must be able and willing to take corrective action. But then it becomes a question of where the line should be drawn, and what process would be appropriate for agency review and remedy – and we are back full circle.

It may be that I exaggerate the difficulties. Perhaps, somewhere, there are good and workable solutions waiting to be articulated. My purpose here is to direct attention to the problems, and I urgently request that interested parties focus on them in the overall Inquiry.

In light of Commissioner Johnson's concurring/dissenting opinion, I feel I must add a few words at this point. He simply sweeps away the problems I've been discussing with two approaches, both of them invalid. First, he asserts that "fairness . . . is no more difficult to apply – or to use in guiding men's behavior – than 'negligence', 'false and misleading', 'tend to create a monopoly', or 'the reasonable man'". He is right: these are all honorable legal concepts. But none of them involve, as the case before us clearly does, free speech or free press considerations. Commissioner Johnson wants to have it both ways. In such recent cases as "The Selling of the Pentagon", he comes down hard on the inappropriateness of governmental intrusion into the journalistic process; but here, where he urges the Commission to intrude in great detail into that same process, he has no problem. I can't grasp his distinction. This is a most sensitive area. And there is always the need to tailor our actions with infinite care – as we all recognized in two sua sponte modifications of our personal attack rules in order to avoid a "chilling effect" on broadcast journalism.

Our objective is clear: to promote "uninhibited, robust, wide-open debate" by means of Commission policies that do not unduly intrude into the broadcast

process. For to do that would precisely frustrate our objective. Unlike Commissioner Johnson, I believe it markedly serves the public interest, and specifically the purposes of the First Amendment, to face the issue head on: namely, is there some workable middle course?

Commissioner Johnson need not face that issue – and this leads to my second comment on his opinion – because he has already opted for one of the extremes. He would adopt an "equal opportunities" approach with a vengeance, requiring that NBC ". . . air additional programming against the Alaskan pipeline which can reach the same audience as saw the original ESSO spots . . . with the same force and with the same regularity as the original spots". In its ultimate logic, this approach would involve a counter-announcement for every announcement, back-to-back, and measuring to the same split-vibration on some "intensity" scale. I will not repeat the reasons why, in my judgment, the approach Commissioner Johnson recommends in this case would signal the end of robust, wide-open debate altogether. See discussion supra. It would be poor policy and worse law. See §315(a); Green v. FCC, supra.

Finally, I turn to the resolution of the matter in the case before us. Because, of course, the Commission must resolve the issue as best it can on the basis of existing policies. I think it has.

The test is whether NBC has afforded reasonable opportunity – whether the American public has or has not been ". . . left uninformed" on one side of this pipeline issue by NBC's actions. Further, the test is not what we would do as broadcast journalists but whether we can say that NBC's actions here are of such a nature that they may be termed arbitrary. I cannot find that to be the case. If we are to prescribe criteria that would result in some other conclusion, they must emerge from the Inquiry on the basis of overall considerations, and not by yet another ad hoc determination in the confines of this narrow adjudication.

APPENDIX

Following is an analysis by the Commission's staff of material broadcast by NBC dealing with the general subject of the ESSO announcements during the period June 7, 1970 through September 15, 1971. The amount of time accorded each side of the issue, based upon the estimate of the staff, is given in minutes and seconds. That which was believe to have favored the position set forth in the ESSO announcements is listed under the heading "Pro" and that which appeared to have advocated a contrasting view is listed under "Anti".

WILDERNESS SOCIETY AND FRIENDS OF THE EARTH

Date of Broadcast	Pro	Anti
June 7, 1970	4:40	5:35
September 10, 1970	:20	1:00
January 13, 1971	:06	:15
February 14, 1971	----	:10
February 16, 1971	:49	1:05
February 24, 1971	:15	1:30
February 28, 1971	1:32	----
June 4, 1971	1:58	----
July 11, 1971	:27	2:15
August 6, 1971	:45	1:10
August 26, 1971	----	:15
September 15, 1971	----	8:00
Totals	10:52	21:15

OPINION OF COMMISSIONER NICHOLAS JOHNSON
CONCURRING IN PART AND DISSENTING IN PART

The question of the desirability of building a pipeline across Alaska is, to borrow from the rhetoric of the law of the fairness doctrine, "a controversial issue of public importance."

Standard Oil of New Jersey (ESSO) favors the pipeline. The Wilderness Society and Friends of the Earth oppose it. NBC has carried programming and commercial announcements regarding the issue. The Wilderness Society and Friends of the Earth, the complainants, believe NBC has violated the fairness doctrine and urge that the FCC order the network to provide more time for the presentation of complainants' position.

On June 30, 1971, the FCC ruled that the commercial spot announcements presented by ESSO were the presentation of one side of a controversial issue of public importance and therefore should be counted along with the programming of NBC in evaluating the balance in the network's presentation. NBC has asked for reconsideration of that decision. The majority denies NBC's request. I concur. However, the opinion of the majority, and the separate opinion of Chairman Burch – finding NBC to have complied with its fairness obligations – warrant some comment.

There are a number of issues before us that need to be separately addressed to be fully understood.

The fairness doctrine requires that a licensee (or network) accord a rough balance in the presentation of various points of view on a controversial issue of public importance in its news and public affairs coverage. As of September 14, 1971, the majority – and I – agreed with NBC that it acted reasonably and in good faith in trying to achieve such a balance in its presentation of the Alaska pipeline issue on its public affairs and news programs. It should be made clear that no one has even suggested a "bias" or lack of professionalism on the part of anyone associated with NBC news.

The problem arises here because of the existence of the commercial spot announcements – paid for by ESSO and carried by NBC – which we have decided supported the construction of the pipeline.

Does the fairness doctrine apply only to programming? The majority has ruled not, that the commercials must be considered. I agree.

Can the fairness doctrine be complied with by merely including commercial announcements along with the other programming in totaling up the balance? NBC has, the morning of September 15, 1971, informed the Commission it has presented an additional eight minutes of anti-pipeline programming (an interview on the Today Show). Can such programming be found to "balance" commercials? The majority has ruled it can. I disagree.

An issue for this Commission to determine is "whether the licensee can be said to have acted reasonably and in good faith" in making certain judgments – "as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming." 1/

An aspect of this task involves totaling up the number of minutes afforded on both sides of the controversial issue in question, and then making a judgment about the reasonableness of the licensee's balance. As much as I recognize the fairly subjective nature of the process involved here, I must say that I feel that NBC has not acted reasonably in presenting both sides of the issues involved in the Alaska pipeline dispute. Accordingly, I cannot agree with the majority's handling of this issue, and I dissent.

There is no doubt that NBC has covered the Alaska pipeline dispute in its news and public affairs programming. Generally, NBC's coverage of this issue in such programming has been balanced. On September 15, 1971, NBC aired the additional eight minutes of anti-pipeline news programming. The true question we face, a question which the majority does not want to admit must be faced, is what effect these additional eight minutes of interview time has on a situtation involving an otherwise balanced news presentation and the presentation of a number of spots giving only the proponent of one side of the public controversy an unfettered opportunity to address and inform the American public on his own terms, with one of the most forceful means of communication known to man (the TV commercial).

According to NBC, one or another of these ESSO announcements were presented a total of 28 times on NBC between November 1970 and April 1971, during Meet the Press, Saturday Night News, and Sunday Night News. I assume that these are 60-second spots, inasmuch as complainant's statement to that effect in their letter in opposition to NBC's petition for reconsideration is uncontradicted by NBC. As such, they constitute 28 minutes of argument for the Alaska pipeline. Throwing all of the programming – news, interviews, and

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1/ Fairness Doctrine Primer, FCC 64-611 (1964), 2.

spots – into the hopper, there is still a ratio of unbalance of approximately 2 to 1 for the pipeline. 2/

There are two questions. (1) What decisional significance does this ratio have? Does 2 to 1 comply with the fairness doctrine? (2) Even if it does, can commercials on one side be balanced by programming on the other?

It is important to begin by stating that our responsibility is not merely to total up the pros and cons and decide the fairness doctrine issue solely according to this arithmetic. Instead, of course, we are talking about the licensee's good faith and reasonableness. No one questions NBC's good faith. What about their reasonableness?

I think it would be useful to quote from NBC's own Directive on the fairness doctrine:

> "The various contrasting points of view on controversial public issues are presented by NBC in regular and special news, discussion and interview programs, under the standard of fairness. This generally meets the public interest goal at which NBC aims. That goal seeks to provide the public with information on a balanced basis, rather than to assure particular advocates with a means of personal expression of their views. In many cases, adding to the NBC coverage of a controversial issue a paid-time presentation advocating a position on that issue might itself lead to imbalance." (Emphasis added.) 3/

Were it not for NBC's last-minute addition of eight minutes of "anti"-programming on September 15, I believe that this excerpt from NBC's own internal management directive alone would establish the fact that NBC was unreasonable in not putting on programming against the Alaskan pipeline to balance the force of the ESSO spots. NBC itself understood, in general, the impact of such spots; NBC has been on notice since June 30, 1971, that the ESSO spots presented one point of view on this controversial issue; thus, NBC should soon have made time available to complainants or other responsible spokesmen for complainants' viewpoint. This would have been a procedure consonant with NBC's own internal policies. What better minimal definition do we have of the word "reasonable" than the licensee's own standard operating procedure? This is not to say that NBC's or any other licensee's standard is per se reasonable on the issue of licensee conduct under the fairness doctrine. It is only to say that if the licensee fails to operate according to what it determines to be in the public interest, there may be a prima facie case of unreasonable conduct.

2/ This ratio is arrived at as follows: Pro, 10:52, Anti, 21:15 (news and public affairs); Pro, 28 (spot announcements). Totals: Pro, 38:52; 21:15 (minutes).

3/ NBC's Petition for Reconsideration, Exhibit A.

In Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283 [19 RR 2d 1103](1970), we ordered the networks to give uninterrupted rebuttal time to opponents of the President's Indochina policy, after we found that the President's five national TV and radio addresses within a few months had created an imbalance in network coverage of the war issue. However, in a separate opinion, I addressed myself to a question I considered far more important and significant than the narrow question of whether on a particular issue the networks' coverage added up to "balance" under the fairness doctrine.

In that opinion, I described the impact of these Presidential broadcasts, which represent, in the purest form, the concept of unfettered individual access to the media:

> "Each [of the President's speeches] was broadcast completely intact, without interruptions, cuts, commercial insertions, or delays. There were no questions asked of the President, either before, during, or after his addresses. 4/

In this case, I would approach the issue of licensee reasonableness in a similar manner to the way I advocated in the Committee for the Fair Broadcasting case. When the proponent of one side of a "controversial issue of public importance" purchases spot advertisements he shares many of the powerful aspects of the Presidential address – his positions are "broadcast completely intact, without interruptions, cuts, commercial insertions, or delays"; and the proponent is asked "no questions . . . either before, during, or after" his spot. In this circumstance I would ask whether the licensee satisfied his fairness doctrine obligation by balancing this spot advertising campaign with an interview program controlled and directed by a third party.

The courts have ruled – generally reversing this Commission – that individual citizens do, under some circumstances, have "access" to radio and television stations for purposes of presenting their own point of view (without having to go through the format of an interview, or the process of having a brief excerpt presented on the news). 5/ The case before us goes nowhere nearly as far. All it requires us to hold is that when a broadcaster <u>does</u> grant access to one party to a controversial issue of public importance, he has created a fairness doctrine obligation to grant direct access for the presentation of opposing points of view as well. The purpose of the fairness doctrine is to insure "that the American public . . . not be left uninformed." (Emphasis in original.) 6/

4/ Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 307 [19 RR 2d 1103] (1970).

5/ Red Lion Broadcasting v. FCC, 395 US 367 [16 RR 2d 2029] (1969); BEM v. FCC F2d [22 RR 2d 2089] (DC Cir 1971).

6/ Green v. FCC, F2d [22 RR 2d 2022] (DC Cir 1971).

Recognizing the impact on the individual, as he becomes informed, of the unrestrained program such as the Presidential address or the commercial spot, in short, recognizing the ability of these types of programs to deliver an unimpeded, undiluted message directly from speaker to listener, I would treat such direct-access programming differently from other informative (and perfectly commendable) programming like the Today interview. It cannot be simply thrown in with the other less powerful programming formats for purposes of evaluating the balance.

Thus, I believe that NBC should be instructed to place on the air additional programming against the Alaskan pipeline which can reach the same audience as saw the original ESSO spots – on Meet the Press, Saturday Night News, and Sunday Night News – with the same force and with the same regularity as the original spots.

Finally, a word about the Chairman's concurring statement.

The broadcasting industry has long ridiculed and fought the fairness doctrine – even its constitutionality, see, Red Lion Broadcasting v. FCC, 395 US 367 [16 RR 2d 2029] (1969). They will undoubtedly read the Chairman's statement with delight.

It would be far preferable, in my view, if an unlimited-channel cable system made access to "television" available to all comers. Then the need for regulation of "broadcasting" would be more analogous to the "regulation" of the magazine industry. But we have not yet reached that day. We are still living in a nation in which mass media, access to the minds of Americans, is disproportionately controlled by a government-sanctioned quasi-monopoly of the three commercial television networks and their affiliates in the largest markets. So long as that condition persists the rationale for FCC regulation, including the fairness doctrine, is as valid today as when Congress debated the issues in the late 1920's and early 1930's and enacted the Communications Act of 1934.

Of course, the fairness doctrine is subjective and difficult to enforce on a case by case basis. But that's what the common law has been all about for centuries. And its creation is what commissioners and judges are paid to do. "Fairness," as it has been interpreted over the years, is no more difficult to apply – or to use in guiding men's behavior – than "negligence," "false and misleading," "tend to create a monopoly," or the "reasonable man." Any of these concepts can be ridiculed and made to appear impossible of administration – especially by those who don't like their effect in the first place. But such is the stuff of which "law and order" is made. It has worked pretty well. It should be improved where it can be. But the anarchy that remains when it's disposed of is a pretty poor substitute.

Finally, it is curious that when a case is difficult or impossible to resolve this Commission usually disposes of it by concluding that the broadcaster wins. It would be as unreasonable to propose that all difficult cases will be resolved in favor of the complaining public interest representative. In fact, I propose we do neither. I think we ought to continue to dispose of these cases as they come along as best we can in light of the body of fairness doctrine law created by the courts and this Commission over the years. I dissent from the way we have done so today.

TV-167

are used by him or by his immediate office staff and they are not published or otherwise made available to others within the agency.

Moreover, it should be pointed out that the Commission has never treated these calendars as records of agency business, and that there is no statute, Commission rule or directive requiring them to be kept for such a purpose.

In short, we believe these calendars, if indeed they exist, are the personal property of the Commissioners and that they are not agency records. The fact that the calendars may contain information pertaining to the Commissioners' work does not, in our judgment, afford a sufficient basis for regarding them as "agency records" subject to the disclosure requirements of the Public Information Act. We also believe that even though no law requires us to maintain them in a confidential status, sound Commission policy and a respect for the privacy of the officials involved militates against our furnishing you with the requested portions.

Accordingly, for the reasons set out above, the request for information filed by Citizens Communications Center in behalf of its clients, Jose Trevino et al., is denied.

Sincerely,

/s/ Dean Burch
Dean Burch

Chairman

FCC 71-1285
74184

In the Matter of)
)
Complaint of)
)
WILDERNESS SOCIETY and)
FRIENDS OF THE EARTH)
Against National Broadcasting)
Company regarding applica-)
bility of fairness doctrine to)
commercial announcements)
sponsored by Standard Oil of)
New Jersey (ESSO).)

Adopted: December 23, 1971
Released: December 27, 1971

[¶10:315(G)(1), ¶10:315(G)(2)] Alaskan pipeline controversy; fairness doctrine.

The fairness doctrine does not require that the issue of the need for developing Alaska oil

reserves quickly and the issue of the ecological effects of transporting oil from Alaska by pipeline be treated as independent controversial issues to be examined separately. The basic controversial issue is the proposed construction of an Alaskan oil pipeline. NBC has reasonably determined that the issue petitioners have wanted influenced is the issue of pipeline construction. There is no indication that the pipeline opponents have not been afforded a reasonable opportunity to make all arguments they regarded as significant. Wilderness Society and Friends of the Earth, 23 RR 2d 431 [1971].

MEMORANDUM OPINION AND ORDER

By the Commission: (Commissioner Johnson dissenting and issuing a statement; Commissioners H. Rex Lee and Reid absent.)

1. By Memorandum Opinion and Order released September 23, 1971, 31 FCC 2d 729 [22 RR 2d 1023], we denied a petition filed by NBC for reconsideration of our earlier ruling of June 30, 1971 that the broadcast of certain commercial announcements sponsored by Standard Oil Company of New Jersey (ESSO) created fairness doctrine obligations relating to the dispute over the proposed construction of an Alaskan oil pipeline. We held that the commercial announcements in question did deal with the controversy surrounding the Trans-Alaskan pipeline, but concluded that no further action was warranted because NBC had a continuing program of broadcasting contrasting views on the issue. We now have before us a further petition for reconsideration filed by The Wilderness Society and Friends of the Earth on October 22, 1971, in which it is requested that we determine whether NBC has broadcast an adequate amount of programming on the issue of "the need of developing Alaskan oil reserves quickly." The petition is opposed by NBC.

2. The essential argument made by the petitioners is that the Commission has found that the pipeline controversy involves two separate issues: (i) the need for developing the oil reserves in Alaska at this time, and (ii) the ecological effects which may ensue from such development, and that we must determine separately whether NBC has complied with the fairness doctrine with respect to the first of these "issues." We do not agree. The clear tenor of our prior treatment of this matter has been that the basic controversial issue involved is the proposed construction of an Alaskan oil pipeline. While we have recognized that the parties to the dispute were in disagreement over both the need for developing Alaskan oil reserves quickly and the ecological effects of transporting oil from Alaska by pipeline, we have not suggested and do not believe that these two facets of the basic problem should be treated as independent controversial issues to be examined separately under the

fairness doctrine. 1/ NBC, we think, has reasonably determined that the issue the petitioners have wanted influenced is the issue of pipeline construction. As the licensee points out, the petitioners have considered the time element important in terms of a governmental decision to grant land use permits for the pipeline. What is important, therefore, is that the spokesmen for the opposing viewpoints on the merits of the pipeline be afforded a reasonable opportunity to express their views. The particular arguments to be made and issues to be raised are matters to be determined by the parties, and there is no indication here that the pipeline opponents have not been afforded a reasonable opportunity to make all arguments they regarded as significant. This is not a case of the sort mentioned in Letter to NBC, 25 FCC 2d 735 [20 RR 2d 301] (1970), where a licensee has made two important points in discussion of an issue and then afforded time only for discussion of contrasting views on one of the points, rejecting fairness requests on the other point. We therefore decline to grant the requested relief.

3. Accordingly, it is ordered, that the petition for reconsideration filed by The Wilderness Society and Friends of the Earth is denied.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Again we are faced with the issue of NBC's compliance with the Fairness Doctrine after its broadcast of several commercials dealing with the Alaskan oil discoveries.

Six months ago we decided that NBC had erred in not treating the issues presented in these advertisements as controversial issues of public importance. Three months ago we denied NBC's petition for reconsideration of the earlier ruling, but ruled, over my dissent, that NBC had complied with its obligations under the Fairness Doctrine to provide reasonable coverage to both sides of the controversy.

On October 22, 1971, the petitioners, Wilderness Society and Friends of the Earth, filed a request that we reconsider one aspect of our September 23, 1971 decision. Their claim is that we erred in limiting the scope of the "controversial issue of public importance" to whether the Alaskan pipeline ought to be built.

In our June 30 decision, we stated that:

> "The quoted advertisements appear to raise issues concerning (i) the need for developing the oil reserves in Alaska at this time and (ii) the ecological effects which may ensue from such development.

1/ Our finding in the September 23, 1971 opinion that an advertisement whose thrust was America's alleged urgent need for oil was germane to the controversy, was a finding of relevance to "the pipeline issue." That finding does not support petitioners' contention that the opponents of the pipeline must be afforded independent response time on the "energy crisis issue."

> . . . On the basis of the information before us, we cannot find the programs cited by you [NBC] afforded reasonable opportunity for the presentation of contrasting views to those presented in the commercials, e.g., the possible adverse ecological and environmental effects and the possibility of obtaining oil elsewhere." 1/

In our September 23 decision, we stated that: "In this case, the ESSO advertisements refer to oil development in the far North and discuss both the need for rapid development of oil deposits and the ecological impacts of such development." 2/ However, later in that opinion, at par. 10, we limit the discussion of NBC's compliance with the Fairness Doctrine to the single issue of whether the oil pipeline ought to be built.

In a separate dissenting and concurring opinion, I argued that NBC had failed to comply with the Fairness Doctrine by failing to present sufficient programming (of the spot-advertisement nature) putting forward the arguments against building the pipeline. In that opinion, I did not address myself to the issue of the need for developing oil reserves in Alaska.

Clearly, from the opinions of June 30 and from the major portion of the majority opinion of September 23, this Commission defined two separate issues – both the desirability of building the pipeline and the need to develop Alaskan oil reserves. Abruptly, in the midst of the September 23 opinion, the Commission reversed its field and limited the discussion to the pipeline issue. It did so without explanation. Now, in the majority's opinion today, there is a lame attempt to cover its elusive tracks:

> "The clear tenor of our prior treatment of this matter has been that the basic controversial issue involved is the proposed construction of an Alaskan oil pipeline. While we have recognized that the parties to the dispute were in disagreement over both the need for developing Alaskan oil reserves quickly and the ecological effects of transporting oil from Alaska by pipeline, we have not suggested and do not believe that these two facts of the basic problem should be treated as independent controversial issues to be examined separately under the fairness doctrine."

I do not believe that the majority has adequately explained why, in mid-stream, the issues were narrowed. While we are not inextricably bound by our prior decision to consider this a two-issue controversy, unquestionably we have the legal obligations to explain in rational, reasonable terms our change-of-mind. We are not allowed the luxury of deciding the same case one way on Monday and the other way on Tuesday. Melody Music, Inc. v. FCC, 345 F2d

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1/ Wilderness Society and Friends of the Earth, 30 FCC 2d 643, at 646 [22 RR 2d 407] (1971).

2/ Wilderness Society and Friends of the Earth, 31 FCC 2d 729, at 733 [22 RR 2d 1023] (1971).

730 [4 RR 2d 2029] (DC Cir. 1965); Burinska v. NLRB, 357 F2d 822 (DC Cir. 1966). Similarly, I do not believe that – in the same proceeding – we can make a conclusion of law in Monday's opinion and reverse it in Tuesday's, without making an adequate, rational explanation. "[T]he Commission . . . must explain its reasons and do more than enumerate factual differences . . . ." 3/ Nor is it legally sufficient for the Commission to say "Black is white, because we say it is," which is the way today's majority opinion seems to read.

We are not required to grant a petition for reconsideration, but the fact is that we have made an error of law in this case, and we are required to correct that error.

If my own position on September 23 must be interpreted as an acceptance of the majority's definition of the (narrowed) issue then I was also in error. I would correct that error by granting the petition for reconsideration in this case, and asking the parties for their comments on NBC's coverage of the issue of whether there is a need to develop the Alaskan oil reserves at this time.

Accordingly, I dissent.

FCC 71-1284
74162

In the Matter of)
)
American Telephone & Telegraph Co. Charges for Domestic Telephone Service AT&T Transmittal Nos. 10989, 11027) Docket No. 19129

Adopted: December 21, 1971
Released: December 23, 1971

[¶10:201, ¶10:202, ¶10:204, ¶10:205] Rate investigation discontinued.

Phase II investigation into matters that could affect the revenue requirements of the Bell System, including the reasonableness of Western Electric's prices and profits, and the amounts claimed by the carriers for investment and operating expenses, and examination of the internal rate structure of the interstate and foreign message toll telephone service, is discontinued. The

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3/ Melody Music, Inc. v. FCC, 345 F2d 730, at 73 (DC Cir. 1965).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act.	))))	Docket No. 19260

Part III: Access to the Broadcast Media as a Result of Carriage of Product Commercials

STATEMENT OF THE FEDERAL TRADE COMMISSION

A. Introduction

The Federal Trade Commission submits this statement to the Federal Communications Commission as an expression of its views with regard to Part III of the FCC's Notice of Inquiry concerning the Fairness Doctrine, i.e., that part of the inquiry entitled "Access to the Broadcast Media as a Result of Carriage of Product Commercials".

As an agency with substantial responsibility for and experience with the regulation of advertising practices and the development and enforcement of official policy respecting the impact of advertising upon the economy, the Federal Trade Commission believes that it has information and views that are relevant to this proceeding, specifically with regard to the economic nature and market impact of broadcast advertising and with regard

to appropriate governmental responses to these aspects of advertising. The following comments express the Commission's support for the developing concept of "counter-advertising", or the right of access, in certain defined circumstances, to the broadcast media for the purpose of expressing views and positions on issues that are raised by such advertising. Although the Commission recognizes the potential complications and various difficult problems with regard to implementation and possible ultimate effects, the Commission is of the view that some form of access for counter-advertising would be in the public interest.

None of the comments contained in this statement should be construed to indicate the Commission's views or position with regard to any issue involved in any adjudicative matter. Indeed, this presentation is based on policy considerations, and avoids specific examples of the general points conveyed in order to prevent any possible prejudgment of cases before the Commission in an adjudicatory posture.

B. Magnitude of the Problem

While much has been said in submissions by other parties concerning the social and cultural impact of

broadcast advertising upon the national character, relatively little attention has been paid to the economic role of advertising and its proper place as a pro-competitive and pro-consumer force in a free enterprise economy. It is, however, from this latter perspective that the Federal Trade Commission approaches the question of determining a responsible, effective governmental posture vis-a-vis broadcast advertising. While others have sought additional or different access rights premised upon a social or cultural view of advertising, such considerations are beyond the scope of this statement.

It would be difficult to overstate the significance of the advertising mechanism in the modern free enterprise economy. To a society that values highly individual choice, the maximization of consumer welfare, and technological progress, fair and effective advertising must be of critical importance. The technique of advertising permits producers to speak directly to purchasers concerning these major

economic decisions. This opportunity enables the consuming public to be sufficiently informed of the range of available options to be in a position, without external aid, to define and protect their own interests through marketplace decision-making. Advertising further provides sellers both a vehicle and an incentive for the introduction of new products and new product improvements.

It is beyond dispute that for a host of consumer goods, broadcast advertising plays a predominant role in the marketing process. In 1970, advertising expenditures in this country totaled almost $7 billion, or approximately $115.00 per family in the United States. $3.6 billion of this sum, or about $60.00 per household, was devoted to broadcast advertising. The vast bulk of all broadcast advertising--$3.2 billion, or $52.00 per family--was television advertising.

Broadcast advertising is dominated by a relatively few major companies. In 1970, fewer than 100 firms accounted for 75% of all broadcast advertising expenditures. Ten firms were responsible for over 22% of all broadcast advertising expenditures, and the comparable figure for television advertising is

even higher. The top ten television advertisers spent almost one-quarter of the money spent for television advertising; the top five alone accounted for over 15%. Moreover, more than half of all TV broadcast advertising expenditures were accounted for by five product categories --food, toiletries, automotive products, drugs, and soaps and detergents--and the figure would have been even higher had cigarette advertising been included. Significantly, sales presentations for these products often raise issues, directly or implicitly, that relate to some of the nation's most serious social problems-- drug abuse, pollution, nutrition and highway safety.

Much of advertising is truthful, relevant, tasteful and - taken as a whole - a valuable and constructive element in this nation's free competitive economy. On the other hand, it is widely asserted that advertising is capable of being utilized to exploit and mislead consumers, to destroy honest competitors, to raise barriers to entry and establish market power, and that there is a need for government intrusion to prevent such abuses.

It is plain that television is particularly effective in developing brand loyalties and building market

shares. The careful combination of visual and sound effects, special camera techniques, the creation of overall moods, and massive repetition can result in a major impact upon the views and habits of millions of consumers. Thus, television has done more for advertising than simply providing animation to the radio voice; it has added a new dimension to the marketing process."

Finally, advertising today is largely a one-way street. Its usual technique is to provide only one carefully selected and presented

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* Television is now "an intimate part of most people's lives and is a major factor in affecting their attitudes, in bringing them information, and in setting their life styles." White House Conference Report on Food, Nutrition and Health, p. 2. See Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969):

> "Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air' . . . . It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." 405 F.2d at 1100-01.

See also Capital Broadcasting Co. v. Mitchell, Civ. Action No. 3495-70 (D.C. Cir., Oct. 14, 1971), upholding the constitutionality of the Congressional ban on broadcast advertising of cigarettes.

aspect out of a multitude of relevant product characteristics. Advertising may well be the only important form of public discussion where there presently exists no concomitant public debate. At times, this may produce deception and distortion where the self-interest of sellers in disclosure does not coincide with the consumer's interest in information.

All of these elements of the modern-day advertising mechanism combine to endow broadcast advertising with an enormous power to affect consumer welfare.

C. The Role of the Federal Trade Commission in Advertising Regulation

As a matter of first priority, the FTC is committed to a program designed to remedy the dissemination of false advertising. Ads that are false or misleading clearly possess the potential of conveying misinformation, distorting resource allocations, and causing competitive injury. The FTC is empowered to proceed against such advertising and constantly strives to do so, primarily by means of administrative litigation, seeking various remedies that will vitiate the effects of the challenged deception.

It is important, however, to recognize two limitations upon litigation as a tool in the regulation of

deceptive advertising. First, litigation is generally a lengthy and very costly device for the resolution of conflicts and in many instances cannot be successfully concluded until the damage has been done. Further, the Commission's resources are far too small to permit a formal challenge to every case of deception coming to its attention, and we may select priorities that result in our neglect of some important instances of advertising abuse. Second, the litigation process may be a relatively unsatisfactory mechanism for determination of the truth or accuracy of certain kinds of advertising claims. As suggested below, some advertising is based on "controversial" factual claims and opinions, and litigation may fail to resolve the controversies involved.

The FTC has recently undertaken to utilize a supplementary tool for the encouragement of truth-in-advertising. This technique is the systematic use of information-gathering and public-reporting authority under Section 6 of the FTC Act, in the form of a program of submission, by all advertisers in selected major industries, of substantiation for advertising claims, for evaluation and use by the general public. While this program alleviates some of the shortcomings of litigation, it is nevertheless subject to two major

limitations. First, this particular program can deal effectively with only those claims that purport or appear to be "objectively verifiable"; i.e., claims which, if set forth carefully, must be based on and supported by laboratory tests, clinical studies, or other fully "adequate" substantiating data. Second, this program also is limited by the extent of available resources. Even if the program succeeds in its expressed goal of seeking and then screening substantiating data with respect to a different product line each month, it will not reach most of the broadcasting advertising that appears each broadcast season.

In addition to being truthful, it would be desirable for advertising to be "complete" in the sense that it makes available all essential pieces of information concerning the advertised product, i.e., all of the information which consumers need in order to make rational choices among competing brands of desired products. Where the advertising for a particular product fails to disclose the existence of a health or safety hazard involved in the use of the product, or where it fails to provide some other "material" informational element in a circumstance in which such nondisclosure results in a misleading impression concerning the advertised

product, the FTC is empowered to require clear and conspicuous disclosure of the relevant warning or other information, through litigation and/or rulemaking procedures. Moreover, failure to disclose performance or quality data in a manner that would facilitate comparison of the value of all competing brands is also within the power of the FTC to correct, at least in those circumstances in which the nondisclosure denies to consumers the kind of information which is found essential to the proper use of the advertised product.

The FTC's efforts to foster "completeness" by means of such disclosures is subject to two impediments. First, required disclosures must compete for consumer attention with the advertiser's own theme and message. Given the limitations of short commercials, it is usually impossible to require inclusion of the entire range of material information which consumers need and should have for intelligent shopping.* Second,

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* The average 30 second spot contains only one major selling point. Yet the consumer may wish to make his or her choice with regard to many products on the basis of a potential multitude of relevant characteristics. See Testimony of Thomas C. Dillon, Hearings on Modern Advertising Practices Before the Federal Trade Commission, October 22, 1971, p. 322, 343. (All citations from the Hearings on Modern Advertising Practices are from the uncorrected transcript, and may be supplemented or contradicted by other testimony appearing elsewhere in the transcript.)

the FTC's efforts are necessarily aimed at imposing disclosure requirements upon advertisers who may believe their self-interest is hindered by the dissemination of the information in question. In such cases, one cannot expect the disclosures to be presented as clearly or effectively as would be the case of presentations by advocates who believe in the information and want it to be used by viewers and consumers.

D. The Role of Counter-Advertising

The Commission believes that counter-advertising would be an appropriate means of overcoming some of the shortcomings of the FTC's tools, and a suitable approach to some of the failings of advertising which are now beyond the FTC's capacity. While counter-advertising is not the only conceivable technique, regulatory or otherwise, for ameliorating these problems, it may be the least intrusive, avoiding as it does the creation of additional governmental agencies or further direct inhibitions on what advertisers can say. Counter-advertising would be fully consistent with, and should effectively complement, the enforcement policies and regulatory approaches of the FTC, to foster an overall scheme of regulation

and policy which would deal comprehensively with many important aspects of advertising, to insure with greater certainty that advertising serves the public interest.

Any attempt to implement a general right of access to respond to product commercials must allow licensees a substantial degree of discretion in deciding which commercials warrant or require access for a response. Certainly, it is implicit in the foregoing discussion that not all product commercials raise the kinds of issues or involve the kinds of problems which make counter-ads an appropriate or useful regulatory device. It is equally clear, however, that the licensee's discretion should be exercised on the basis of general rules and guidelines which should, inter alia, specify the general categories of commercials which require recognition of access rights.

The FTC believes that certain identifiable kinds of advertising are particularly susceptible to, and particularly appropriate for, recognition and allowance of counter-advertising, because of characteristics that warrant some opportunity for challenge and debate. Such an opportunity has not been afforded sufficiently by means of broadcast news or other parts of programming,

and it is unlikely that it will or can be so afforded by such means at any time in the future. Hence, it is believed that challenge and debate through counter-advertising would be in the public interest with respect to the following categories of advertising:

1. Advertising asserting claims of product performance or characteristics that explicitly raise controversial issues of current public importance.

Many advertisers have responded to the public's growing concern with environmental decay by claiming that their products contribute to the solution of ecological problems, or that their companies are making special efforts to improve the environment generally. Similar efforts appear with respect to the public's concern with nutrition, automobile safety, and a host of other controversial issues of current public importance. While other approaches could, of course, be devised, the most effective means of assuring full public awareness of opposing points of view with regard to such issues, and to assure that opposing views have a significant chance to persuade the public, is counter-advertising, subjecting such issues to "free and robust debate" in the marketplace of ideas.

The FCC has apparently already recognized the existence of Fairness Doctrine obligations with regard

to this category of advertising.* Hence, there is no need for further discussion at this point.

2. Advertising stressing broad recurrent themes, affecting the purchase decision in a manner that implicitly raises controversial issues of current public importance.

Advertising for some product categories implicitly raises issues of current importance and controversy, such as food ads which may be viewed as encouraging poor nutritional habits,** or detergent ads which may be viewed as contributing to water pollution. Similarly, some central themes associated by advertising with

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* See In re Complaint of Wilderness Society, Friends of the Earth, et al. (Esso), 31 F.C.C. 2d 729 (September 23, 1971); see also Letter to National Broadcasting Co., et al. (Chevron), 29 F.C.C. 2d 807, p. 7, n. 6 (May 12, 1971).

** The White House Conference Report on Food, Nutrition and Health, page 179: "The gaps in our public knowledge, along with actual misinformation, carried by some media are contributing seriously to the problem of hunger and malnutrition in the United States." The Conference Report noted that some commercial messages in food advertising which purport to be educational are in fact counter-educational: "No other area of the national health probably is as abused by deception or misinformation as nutrition." The report urged that action be taken to require corrective information to the public concerning any prior deceptive advertising. "This action is necessary to counteract the tremendous counter-education of our children by false and misleading advertising of the nutritional value of foods, particularly on television."

various product categories convey general viewpoints and contribute to general attitudes which some persons or groups may consider to be contributing factors to social and economic problems of our times. For example, ads that encourage reliance upon drugs for the resolution of personal problems may be considered by some groups to be a contributing cause of the problem of drug misuse. Counter-advertising would be an appropriate means of providing the public with access to full discussion of all of the issues raised by the above types of advertising, thus shedding light upon the perceived effects of advertising upon societal problems.*

3. Advertising claims that rest upon or rely upon scientific premises which are currently subject to controversy within the scientific community.

Some products are advertised as being beneficial for the prevention or cure of various common problems,

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* Support for the application of Fairness Doctrine rights to this general category of advertising can be found in Friends of the Earth v. FCC, Dkt. 24,566 (D.C. Cir., Aug. 16, 1971): "Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance of Banzhaf incapable."

or as being useful for particular purposes because of special properties with regard to performance, safety and efficacy. For example, a drug may be advertised as effective in curing or preventing various problems and ailments. A food may be advertised as being of value to various aspects of nutritional health or diet. A detergent or household cleanser may be advertised as capable of handling difficult kinds of cleaning problems.

Such claims may be based on the opinions of some members of the scientific community, often with tests or studies to support the opinions. The problem with such claims is that the opinions on which they are based are often disputed by other members of the scientific community, whose opposing views are based on different theories, different tests or studies, or doubts as to the validity of the tests and studies used to support the opinions involved in the ad claims.

If an advertiser makes such a claim in a manner that implies that the claim is well-established and beyond dispute, when in fact the claim is currently subject to scientific controversy, the advertiser probably would be guilty of deceptive advertising, and the FTC is empowered to take formal action to eliminate the deception.

However, counter-advertising could be a more effective means of dealing with such cases. For example, formal government action against such claims might, on occasion, unfortunately create the misimpression of official preference for one side of the controversy involved in the advertising. Counter-advertising would permit continued dissemination of such claims while subjecting them to debate and vigorous refutation, providing the general public with both sides of the story on the applicable issues. Such debate and discussion would be a useful supplement to a continued FTC concern with other forms of abuse of advertising in this general category.

4. Advertising that is silent about negative aspects of the advertised product.

We have noted some shortcomings of the FTC's efforts to foster "completeness" by imposing disclosure requirements. In these and other circumstances, the FTC believes that counter-advertising would be a more effective means of exposing the public to the negative aspects of advertised products. This is especially true for situations in which there is an open question as to the existence or significance of particular negative aspects.

For example, in response to advertising for small automobiles, emphasizing the factor of low cost and economy, the public could be informed of the views of some people that such cars are considerably less safe than larger cars. On the other hand, ads for big cars, emphasizing the factors of safety and comfort, could be answered by counter-ads concerning the greater pollution arguably generated by such cars. In response to advertising for some foods, emphasizing various nutritional values and benefits, the public might be informed of the views of some people that consumption of some other food may be a superior source of the same nutritional values and benefits. In response to advertising for whole life insurance, emphasizing the factor of being a sound "investment," the public could be informed of the views of some people that whole life insurance is an unwise expenditure. In response to advertising for some drug products, emphasizing efficacy in curing various ailments, the public could be informed of the views of some people that competing drug products with equivalent efficacy are available in the market at substantially lower prices.

This list of examples could go on indefinitely, for the existence of undisclosed negative aspects, or

"trade-offs" of one sort or another, is inherent in all commercial products and thus in all advertising. Rather than forcing all advertisers to disclose all such aspects in all of their own ads, it is more efficient and more effective to provide for such disclosures, to the maximum extent possible, through counter-advertising.

E. Implementation of These Proposals

While adoption of these suggestions may impose additional economic and social costs, the extent of such costs will largely depend on the mode of implementation. The FTC does not possess the expertise to speak definitely on this point, but it would appear that adoption of a variety of procedures and limitations could minimize the costs involved in these proposals, to a point where the countervailing public benefit far exceeds any loss.

For example, the Commission recognizes that it may be desirable to impose strict limits upon access rights within each category. In addition to limitations on the frequency and duration of replies in each category, it might be appropriate to prohibit replies to particular ads (as opposed to all advertising for certain product categories), at least for some types of advertising

problems. For example, with respect to the problems and issues raised by general ad themes, it might be appropriate to require replies to apply to all advertising involving the theme or product in question, rather than being aimed at one particular ad or one particular brand. Such a limitation, however, would be inappropriate with regard to some other categories, such as "public issue" ads, that explicitly raise controversial issues of current public importance in connection with the marketing of particular brands.

Further, it is not essential that counter-advertising be presented in the 30 or 60 second spot format so frequently utilized for commercial advertisements. In fact, that procedure might unacceptably increase either the cost of commercial advertising, thereby possibly raising barriers to entry into some consumer goods industries, or the percentage of broadcast time devoted to disconnected spots, thereby increasing the proportion of broadcast time devoted to selling and decreasing the proportion devoted to programming and entertainment. While there is reason to doubt that regular news or public service programs can effectively serve the counter-advertising function, short spots are not necessarily the only alternative.

For instance, licensees might make available on a regular basis five minute blocks of prime time for counter-advertisements directed at broad general issues raised by all advertising involving certain products, as a way of fulfilling this aspect of their public service responsibilities.

Beyond these general considerations, it is only appropriate that the Federal Trade Commission defer to the Federal Communications Commission on questions that relate to the more precise mechanics of implementing the concept of counter-advertising. That these proposals are workable does, however, seem clear both from a review of prior FCC experience with application of the Fairness Doctrine to cigarette ads and from the submissions in this proceeding by those versed in the mechanics of implementing access rules. We do, however, urge that the following points be embodied in any final plan:

1. Adoption of rules that incorporate the guidelines expressed above, permitting effective access to the broadcast media for counter-advertisements. These rules should impose upon licensees an affirmative obligation to promote effective use of this expanded right of access.

2. Open availability of one hundred percent of commercial time for anyone willing to pay the specified rates, regardless of whether the party seeking to buy the time wishes to advertise or "counter" advertise. Given the great importance of product information, product sellers should not possess monopolistic control by licensees over the dissemination of such information, and licensees should not be permitted to discriminate against counter-advertisers willing to pay, solely on account of the content of their ideas.

3. Provision by licensees of a substantial amount of time, at no charge, for persons and groups that wish to respond to advertising like that described above but lack the funds to purchase available time slots.

In light of the above discussion, it seems manifest that licensees should not limit access, for discussions of issues raised by product commercials, to those capable of meeting a price determined by the profitability of presenting one side of the issues involved. Providing such free access would greatly enhance the probability that advertising, a process largely made possible by licensees themselves, would fully and fairly contribute to a healthy American marketplace.